Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

LEON KIRKPATRICK, et al.,

Petitioners,

v.

CITY OF BANGOR,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Judicial Court Of The State Of Maine

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Does a municipality violate the Due Process Clause by entering an order requiring destruction of a building as a nuisance following a hearing, where the notice of hearing did not specify either the defects alleged or the standards that would be used to decide whether the building should be destroyed?

II. Where a municipality relies upon structural defects and damage in determining that a building is a nuisance which shall be destroyed without compensation, does the Due Process Clause require that the property owner have a reasonable opportunity to repair the defects and damage before the building is demolished?

PARTIES TO THE PROCEEDING

Petitioners are Leon and Gertrude Kirkpatrick, plaintiffs in the action and appellees in the Supreme Judicial Court of Maine. Defendant is the City of Bangor, appellant below.

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On September 25, 1996, the Bangor City Council ordered the Kirkpatricks to demolish their building, located at 30 Highland Avenue in Bangor, Maine, within 30 days. See App. 19a. On May 8, 1998, the Superior Court of the State of Maine, Penobscot County, entered its Order on Appeal ("Ord. App"), remanding the matter to the Bangor City Council for further hearing and issuance of an order of disposal consistent with the Order on Appeal. See Ord. App. 5, App. 17a-18a. The opinion of the Maine Supreme Judicial Court reversing the Order on Appeal and directing entry of judgment for the City of Bangor is reported as *Kirkpatrick v. City of Bangor*, 728 A.2d 1268 (Me. 1999). See App. 1a.

JURISDICTION

The final judgment of the Maine Supreme Judicial Court was entered May 13, 1999. On July 28, 1999, Justice Souter signed an order in Application No. A-100 extending the time in which to file a petition for a writ of certiorari to and including September 10, 1999.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). Petitioner has been deprived of property in violation of the protections guaranteed by the United States Constitution.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment XIV

[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

17 Me. Rev. Stat. Ann. § 2851

Whenever the municipal officers in the case of a municipality, or the county commissioners in the case of the unorganized or deorganized areas in their county, find that a building or structure . . . is structurally unsafe; unstable; unsanitary; constitutes a fire hazard; is unsuitable or improper for the use or occupancy to which it is put; constitutes a hazard to health or safety because of inadequate maintenance, dilapidation, obsolescence or abandonment; or is otherwise dangerous to life or property, they may after notice and hearing on this matter adjudge the same to be a nuisance or dangerous and may make and record an order prescribing what disposal must be made of that building or structure.

1. Notice. The notice must be served on the owner and all parties in interest, as defined in Title 14, section 6321, in the same way service of process is made in accordance with the Maine Rules of Civil Procedure.

2. Notice; how published. When the name or address of any owner or co-owner is unknown or is not ascertainable with reasonable diligence, then the notice must be published once a week for 3 successive weeks

prior to the date of hearing in a newspaper generally circulated in the county, or if none, in the state paper.

3. Order. The order made by the municipal officers or county commissioners must be recorded by the municipal or county clerk, who shall cause an attested copy to be served upon the owner and all parties in interest in the same way service of process is made in accordance with the Maine Rules of Civil Procedure. If the name or address cannot be ascertained, the clerk shall publish a copy of the order in the same manner as provided for notice in subsection 2.

4. Proceedings in Superior Court. In addition to proceedings before the municipal officers or the county commissioners, the municipality or the county may seek an order of demolition by filing a complaint in the Superior Court situated in the county where the structure is located. The complaint must identify the location of the property and set forth the reasons why the municipality or the county seeks its removal. Service of the complaint must be made upon the owner and parties-in-interest in accordance with the Maine Rules of Civil Procedure. After hearing before the court sitting without a jury, the court shall issue an appropriate order and, if it requires removal of the structure, it shall award costs as authorized by this subchapter to the municipality or the county. Appeal from a decision of the Superior Court is to the law court in accordance with the Maine Rules of Civil Procedure.

STATEMENT

This case involves the unsettled question of what process is due when a municipality determines to destroy a former residential building as a nuisance where there is no immediate threat to health or safety. Long ago, this Court ruled that the municipal police power to interfere with private property is circumscribed by the constitutional requirements of due process of law. See *Yates v. Milwaukee*, 77 U.S. (10 Wall.) 497, 19 L. Ed. 984 (1871). And in *Schroeder v. City of New York*, 371 U.S. 208 (1962), it was held that a city must provide adequate notice of a deprivation, there the condemnation of certain water rights, including the right to pursue damages for the taking, in order to comport with due process requirements. More recently, in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), this Court held that when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, the owner is entitled to compensation for the taking that results. *Id.* at 1015. Just this year, in *City of West Covina v. Perkins*, 525 U.S. 234 (1999), this Court passed upon the obligation of the State to provide fair procedures to ensure return of property when the State no longer has a lawful right to retain it. However, this Court has not ruled on the minimum due process requirements that must be observed, in the absence of an imminent threat to health or safety, before a municipality may order destruction of a valuable building.

In a ruling which conflicts with holdings from other states and the federal circuit courts, the Maine Supreme Judicial Court ruled that the City of Bangor could order the destruction of the Kirkpatricks' building as a nuisance

without considering alternative remedies, specifying needed repairs or giving the owners a chance to correct defects. This holding represents a significant new interpretation of the Due Process Clause. If the Maine court's ruling is allowed to stand, its rationale would undermine basic teachings of due process which other courts have viewed as well settled, and permit municipalities to destroy buildings and other private property following the barest of pro forma hearings.

Procedural History

On August 29, 1996, the Bangor City Council notified the Kirkpatricks that a public hearing would be held to " 'decide whether to condemn the building or structure . . . as a dangerous building. . . . ' " See *Kirkpatrick*, 728 A.2d at 1269, App. 2a. The notice did not identify any specific defects in the property or cite any building code provisions that were alleged to have been violated, nor did it identify the standards to be used in deciding what order would be entered. Following the public hearing, held on October 28, 1996, the City Council decided that the building was dangerous and a nuisance, pursuant to 17 Me. Rev. Stat. Ann. § 2851, and ordered the Kirkpatricks to demolish the building within 30 days.

The Kirkpatricks appealed the City Council's order to the Maine Superior Court, alleging that the order was arbitrary, capricious, and not supported by the evidence, and that the City Council was taking property without just compensation. Noting that "demolition of a building is a drastic measure with possible constitutional dimensions," the Superior Court ruled that the Kirkpatricks

were entitled to be informed of any alternative short of total demolition, to have notice of the "specific defects which make the building dangerous and/or a nuisance," and to have "a reasonable time frame within which repairs are to be completed." See App. 18a.

The City of Bangor appealed. The Maine Supreme Judicial Court ruled that "due process does not require yet another opportunity for the property owners to address the deficiencies," and reversed the judgment of the superior court. *Kirkpatrick*, 728 A.2d at 1273. See App. 11a.

Statement of Facts

Leon and Gertrude Kirkpatrick have owned the building located at 30 Highland Avenue in Bangor, Maine for over 40 years. The building was originally divided into five separate apartments with a shared bathroom and no central heating. To meet applicable housing codes for a five-unit apartment building, the Kirkpatricks installed central heating and individual bathrooms for each apartment. App. 2a. Mr. Kirkpatrick, a licensed master electrician, has performed most of the necessary maintenance and repairs on the premises. The property remained inhabited and in compliance with applicable housing codes until the early 1980's when tenants, responsible for purchasing their own fuel, failed to heat the building, causing the pipes to freeze and burst. *Id.*

Subsequently, the property was placarded as "unfit for human habitation" for lack of heat. The property has been vacant since 1983. *Id.* From 1988 to 1996, the Bangor Code Enforcement Office ("CEO") received 39 reports

regarding the building, but most of the contacts related to break-ins by unknown persons and the city actually increased the assessed valuation of the property during this period. The Maine Supreme Judicial Court stated that several of the complaints related directly to the condition and safety of the building, but this statement is not supported by the record. See App. 3a, 71a-73a. Some of these complaints were followed by communications to the Kirkpatricks regarding the problems. However, none of the communications identified code violations relating to the structural integrity of the building. App. 17a, 3a-4a, 34a. The Kirkpatricks responded each time they were notified by correcting the noticed problem. App. 34a. Although Bangor has a property maintenance ordinance, the Kirkpatricks were never cited for violations of that ordinance in connection with this property. During the period from 1990 to 1995, Bangor increased the assessed value of the building for tax purposes from $18,000 to $25,600. Tr. 8, App. 35a.

In April of 1996, the CEO inspected the building because it had remained vacant for a significant period of time and the CEO felt there was a possibility of either structural defects or fire hazards. App. 2a. Subsequently, the City notified the Kirkpatricks that a hearing would be held "relative to the condemnation of a structure located at 30 Highland Avenue." The notice did not identify defects or grounds upon which the condemnation was based, nor did it state the standards the City Council would use at the hearing or reveal that the sole purpose of the hearing was to enter an order to destroy the building. See App. 23a-24a.

In October of 1996, the hearing was held. No specific building code violations were identified in either the inspection or in the testimony before the City Council. Instead, witnesses testified generally at the hearing that the building had structural problems in the foundation, rotted decks, broken windows, missing windows, rotted fascia trim, rotted wood siding, missing steps, rotted steps, no exterior lighting, a rotted porch overhang, and that the building's two chimneys were in a state of disrepair. Additional evidence showed that the driveway had grassed over, there was a retaining wall in the front yard in need of repairs, and the inspector feared that the building was extensively contaminated with lead paint. Finally, according to the City's witnesses, the interior of the building needed new paint, a new electrical system, new kitchens, and new bathrooms. App. 3a-4a.

The City's witnesses at the hearing did not identify any course of action, repairs or rehabilitation actions for the Kirkpatricks to undertake. There was no charge that the Kirkpatricks had previously failed to respond to notices of code violations, or otherwise failed to repair the building. No finding was made that the building was beyond repair or that repair was not economically feasible. The October, 1996 hearing was the first time the building had been brought up before the City Council pursuant to § 2851. App. 17a, 25a-26a.

The Kirkpatricks appeared at the hearing personally and by counsel. Their evidence showed that the structure had been there for 140 years, and that its structural integrity had not changed in the 45 years they had owned it. The Kirkpatricks had spent over $4,000 on maintenance of the property in 1996. Tr. 8, App. 35a. They had

repaired the roof so it no longer leaked. Tr. 10, App. 38a. Each time a code violation had been reported to them, the Kirkpatricks had responded by securing the building. Tr. 16, 26, App. 47a, 62a. They were willing to work with the City Council to rehabilitate the property over a period of time. Tr. 18-19, App. 50a, 52a. The building had been assessed for property tax purposes at $25,000. App. 35a.

Following the hearing, the City Council determined that the building was structurally unsafe and unstable, a fire hazard, and unsuitable for use as a residence. The City Council decided that the building was dangerous and a nuisance, pursuant to § 2851, and ordered the Kirkpatricks to demolish the building within 30 days. The City Council's order provided that if the structure was not demolished within 30 days, the City could cause the structure to be removed at the Kirkpatricks' expense. App. 19a-22a. See *Kirkpatrick*, 728 A.2d at 1270, App. 1a.

The Kirkpatricks appealed the City Council's order to the Maine Superior Court, raising three issues. They argued (1) that there was insufficient evidence in the record to support the City Council's finding that the building was a nuisance or dangerous; (2) that the City Council improperly relied upon aesthetic and non-public safety concerns in condemning the property; and (3) as a matter of constitutional law, the Kirkpatricks were entitled to a reasonable opportunity to repair the structure before a demolition order was issued. See Ord. App. 2, App. 14a.

After trial on the Kirkpatricks' appeal, the Superior Court ruled that the matter should be remanded to the City Council to hear further evidence as to what remedial

action could be taken to render the structure not dangerous nor structurally unsound. The court ruled that there was no immediate or serious threat posed by the building, as indicated by the City Council's decision not to proceed under the Maine statute which permitted immediate action on those grounds. Ord. App. 4-5. The Superior Court also noted that the City had not chosen the remedy provided by § 2851(4), under which the City could seek an order of demolition and an award of costs by judicial action. Ord. App. 4. Noting that the record was "devoid of any consideration of alternative remedies," the Superior Court ruled that the order of destruction violated constitutional mandates. See Ord. App. 5. The Superior Court's order required that after remand, the City Council's order pursuant to § 2851 must indicate "specific defects which make the building dangerous and/or a nuisance and shall prescribe a reasonable time frame within which repairs are to be completed." Finally, the Order on Appeal specified that demolition could be ordered only as "the remedy of last resort." See Ord. App. 5-6, App. 17a-18a.[1]

On appeal from the Superior Court's Order, the Supreme Judicial Court ruled that the City Council had

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[1] The second count of the Kirkpatricks complaint in Superior Court alleged that if § 2851 permits demolition of a dangerous building, the municipality must compensate the building's owner. The trial court ruled that compensation would be awarded only if the demolition order was wrongful, and found that if the demolition order was proper, there would be no wrongful taking. See Ord. App. 6, App. 18a. This finding was not part of the appeal before the Maine Supreme Judicial Court. See 728 A.2d at 1270.

not violated the Kirkpatricks' due process rights by ordering the destruction of their property. See *Kirkpatrick*, 728 A.2d at 1270, App. 1a. The state high court rejected the lower court's ruling which required a list of necessary repairs and a reasonable opportunity to effect them. *Id.* at 1273, App. 11a. In its opinion, the Maine Supreme Judicial Court mentioned none of the cases that had been cited in support of the Kirkpatricks' position in their brief. Instead, relying on the provisions of § 2851, the Maine high court held that after providing a building owner with both notice and hearing on the matter, a municipality may adjudge a building or structure to be dangerous or a nuisance. *Id.* at 1271, App. 11a. It then has authority to "make and record an order prescribing what disposal must be made of that building or structure." *Id.* Nothing in the language of § 2851 limits the remedies available to the City when ordering what disposal must be made, said the court, noting that the authority of a municipality to order a building or structure demolished after adjudging it to be dangerous or a nuisance had been recognized in earlier cases. *Id.* (citing *Michaud v. City of Bangor*, 159 Me. 491, 494, 196 A.2d 106 (1963)).

REASONS FOR GRANTING THE PETITION

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT BETWEEN THE RULING OF THE MAINE SUPREME JUDICIAL COURT IN THIS CASE AND THE RULINGS OF OTHER STATE HIGH COURTS AND FEDERAL CIRCUIT COURTS AS TO WHETHER A MUNICIPALITY VIOLATES THE DUE PROCESS CLAUSE BY ENTERING AN ORDER REQUIRING DESTRUCTION OF A BUILDING AS A NUISANCE, WITHOUT CONDUCTING A HEARING WHICH WAS PRECEDED BY REASONABLE NOTICE TO THE OWNER OF THE DEFECTS AND THE STANDARDS TO BE USED IN DECIDING WHETHER THE BUILDING SHOULD BE DESTROYED.

Procedural due process requires that a hearing before an impartial decision maker be provided at a meaningful time, and in a meaningful manner, before a governmental decision is made which deprives individuals of a liberty or property interest. See *Mathews v. Eldridge*, 424 U.S. 319, 332-33 (1976). It has long been undisputed that the owner of a building has an important property interest which is subject to the protection of this Fourteenth Amendment provision. The City of Bangor has not contested this right or claimed that it does not apply here, particularly where there was neither an immediate danger posed by the property nor a record of past failure to respond to orders to repair.

This Court has ruled in the past that the power to interfere with property rights by means of the police power is not unlimited. In *Yates v. Milwaukee*, 77 U.S. (10 Wall.) 497, 19 L. Ed. 984 (1871), for example, it was held that a city could not simply pass an ordinance declaring

particular property to be a nuisance and ordering its abatement, where the city had made no specific findings that the property was a nuisance or injurious to the public. *Id.* at 505. More recently, this Court has held that whenever the police power is relied upon to interfere with property, it must be shown

> First, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.

See *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962).

Commentators have viewed these and other cases as showing that the police power must be used with great caution, and that the means used to abate dangerous property should be the least intrusive necessary to remedy the problem. The leading treatise on municipal law states that "destruction of property is a drastic remedy and it must necessarily be a remedy of last resort." See 7A Eugene McQuillen, Law of Municipal Corporations § 24.561 (3d ed. 1989 & Supp. 1999). A Harvard Law Review note collecting state cases on the topic points out that demolition is not ordered unless there is "no alternative remedy," and that states uniformly require notice and an opportunity for hearing before destruction will be ordered. See Note, *Enforcement of Housing Codes*, 78 Harv. L. Rev. 801, 832 (1965). The essence of due process is that a deprivation of a property or liberty interest must "be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). However, this

Court has not previously dealt with the question of what due process requires, at a minimum, when a municipality applies a state law permitting the abatement of property as a nuisance.

The Maine Constitution and the Constitution of the United States are " 'declarative of identical concepts of due process.' " *Kirkpatrick*, 728 A.2d at 1271 (citing *State v. Rosado*, 669 A.2d 180, 182 (Me. 1996) and *Penobscot Area Hous. Dev. Corp. v. Brewer*, 434 A.2d 14, 24 n.9 (Me. 1981)). In this case, the Maine Supreme Judicial Court held that due process was not violated when the City Council entered its destruction order without first informing the Kirkpatricks as to the defects upon which the order was based and giving them an opportunity to correct the defects. See 728 A.2d at 1272-73.

The Maine court's ruling is in direct conflict with *Hancock v. City Council of City of Davenport*, 392 N.W.2d 472 (Iowa 1986), which held that the owner's due process rights were violated when the municipality failed to inform the property owner before or at the time of the public hearing as to the conditions which he must cure to avoid demolition. *Id.* at 476.

The notice of hearing in *Hancock* was similar to the notice given by the City Council in this case. In *Hancock*, the notice said only that the hearing would determine whether the building was "unsafe and otherwise dangerous." *Id.* at 477-78. Here, the notice said only that the hearing would "decide whether to condemn the building or structure . . . as a dangerous building. . . . " See *Kirkpatrick*, 728 A.2d at 1269, App. 2a.

Both the Iowa Supreme Court and the Maine high court started with the premise that due process notice and hearing requirements apply when a municipality undertakes to exercise its police power to abate nuisances when no emergency exists. See *Hancock*, 392 N.W.2d at 475; *Kirkpatrick*, 728 A.2d at 1272 (citing *Mathews*, 424 U.S. at 335). In contrast with the Maine Supreme Judicial Court, however, the Iowa high court held that due process was violated when the municipality determined that a nuisance existed and ordered demolition in the same proceeding. *Compare Hancock*, 392 N.W.2d at 476 *with Kirkpatrick*, 728 A.2d at 1269.

In *Hancock* as in this case, a public hearing was held, but the Iowa court ruled that the hearing was not meaningful, as required by due process, because the owner was not given notice before or at the time of the public hearing as to the conditions he must cure to avoid demolition. See 392 N.W.2d at 478.

Federal courts, too, have recognized that a destruction order is a remedy of last resort. For example, *Miles v. District of Columbia*, 510 F.2d 188 (D.C. Cir. 1975) ruled that the "essence of the governmental responsibility to accord due process of law" requires that before destroying a building, a municipality must give the owner sufficient notice, a hearing and ample opportunity to demolish the building himself or to do what suffices to make it safe or healthy. *Id.* at 192.

The holding of the Maine Supreme Judicial Court, if adopted by other states and circuit courts, would effect a significant change in the prevailing view of due process.

Heretofore, the cases have held that in order to be meaningful, the notice and hearing must give the owner some clue as to what must be shown in order to avoid the proposed taking of property. But the Maine Supreme Judicial Court in this case held that the notice was adequate, even though it did not specify what defects had to be repaired in order to avoid a demolition order. Certiorari should be granted to resolve the conflict between this new holding and the holdings in the cases from other states and circuit courts set out above.

II. CERTIORARI SHOULD BE GRANTED TO REVIEW THE MAINE COURT'S HOLDING THAT THE FOURTEENTH AMENDMENT PERMITS A PUBLIC AGENCY TO ORDER DESTRUCTION OF A BUILDING WITHOUT COMPENSATION, WITHOUT PROVIDING THE PROPERTY OWNER WITH A REASONABLE OPPORTUNITY TO REPAIR THE DEFECTS AND DAMAGE BEFORE THE BUILDING IS DESTROYED.

The Maine court's ruling represents a major departure in due process doctrine, for it permits a municipality to shift to the property owner the burden to propose alternatives to destruction, and to destroy property without giving the owner an opportunity to repair the defects. The City conceded in the trial court that the building could not be condemned and destroyed merely because it was not occupied as a residence. Ord. App. 5, App. 17a. Further, the City proposed no alternatives to destruction at the hearing before the City Council or at any other time, did not specify what needed to be done to correct the property, and gave the owners no chance to repair the

building despite the Kirkpatricks' willingness to work with the City Council to establish a rehabilitation schedule. Ord. App. 5, App. 17a-18a. The Maine Supreme Judicial Court ruled that due process did not require any of these protections before the demolition order was entered. *Kirkpatrick*, 728 A.2d at 1272-73, App. 16a-17a.

The Maine high court's ruling conflicts with cases from other states and the federal circuits. For example, in *Blanchard v. City of Ralston*, 251 Neb. 706, 559 N.W.2d 735 (1997), the court held that due process was violated, because the owner was not given a reasonable amount of time and meaningful notice of the hazard, so that she could remedy the situation and defend the case. In *Blanchard*, the home had been destroyed pursuant to the municipality's order. The Nebraska court held that the owner's due process rights were violated, because the notice to the owner failed to adequately inform her of what the alleged health hazard was or how she could protect her interest. As a result, the notice was not "meaningful" for due process purposes. *Blanchard*, 251 Neb. at 713, 559 N.W.2d at 740.

Other state courts have disagreed with the Maine court's ruling that a property owner is not entitled to a reasonable opportunity to cure the defects before an order of destruction is entered. See *Kirkpatrick*, 728 A.2d at 1272, App. 16a. Thus, in *Johnson v. City of Paducah*, 512 S.W.2d 514 (Ky. Ct. App. 1974), the court held that the owner should be afforded a reasonable time to repair his property so as to comply with the building code requirements if he so desires. *Id.* at 516. *Accord Washington v. City of Winchester*, 861 S.W.2d 125 (Ky. Ct. App. 1993). And in *Horton v. Gulledge*, 277 N.C. 353, 177 S.E.2d 885 (1970),

overruled on other grounds, State v. Jones, 305 N.C. 520, 290 S.E.2d 675, 681 (1982), the court held that a municipality could not destroy a structure without first giving the owner a reasonable opportunity to bring the building into conformity with the Housing Code. 277 N.C. at 360, 177 S.E.2d at 890. Similarly, the court in *Hawthorne Savings & Loan Ass'n v. City of Signal Hill*, 19 Cal. App. 4th 148, 23 Cal. Rptr. 2d 272, 278 (1993), held that before ordering the demolition of an apartment building, a city had a constitutional duty to first afford the owner a choice of repairing or demolishing building, a reasonable time in which to make that choice and, if the owner chose to repair, a reasonable opportunity to do so. *Id.* at 159, 23 Cal. Rptr. 2d at 278.

Even in cases where demolition orders have been upheld, the importance of meaningful notice and opportunity to be heard has been recognized. Thus, in *Freeman v. City of Dallas*, No. 97-10907, 1999 WL 631750 (5th Cir. Aug. 18, 1999), the court held that there was no due process violation when the owner's property was destroyed, because there was prior notice of the code violations and the owner was given specific information about the condition of the apartment buildings. 1999 WL 631750, at **1-2. And in *Samuels v. Meriwether*, 94 F.3d 1163 (8th Cir. 1996), the owner had previously been notified of twenty conditions found to be in violation of city ordinances. In a subsequent resolution, the city had directed the owner to clean and repair the exterior of the building and to start work on the interior within thirty days, or the city would destroy the building. *Id.* at 1165. Under these circumstances, said the court, there was no

due process violation because the owner had been afforded notice and a meaningful hearing. *Id.* at 1167.

The rationale behind the ruling in the Supreme Judicial Court is in conflict with the holdings of the cases discussed above, such as *Samuels*, where the owners had a 30-day period in which to abate specifically identified defects. See 94 F.3d at 1167. Similarly, in *Murray v. City of Wilkes-Barre*, 38 Pa. Commw. 509, 394 A.2d 1055 (1978), the owner was given a deadline by which to remedy specified problems or face destruction of the property. *Id.* at 510, 394 A.2d at 1056.

Here, by contrast, demolition was ordered summarily, with no alternatives ever considered or proposed by the municipality. Although it was undisputed that there was no immediate danger to persons or other property caused by the Kirkpatricks' building, destruction was ordered with no opportunity to cure the defects or repair the property. The City Council's order was found to be constitutionally permissible in part because the owners failed to propose alternatives, even though the City Council never suggested that there were alternatives to the destruction order, did not supply the Kirkpatricks with any standards by which such alternatives could be measured, and gave them no opportunity after the order in which to abate the conditions which justified the City's actions. Certiorari should be granted to consider whether this state court's interpretation of federally created due process rights comports with the Fourteenth Amendment.

CONCLUSION

For the reasons stated above, this petition is well taken and should be granted.

Dated: September, 1999.

CHARLES E. GILBERT, III
Attorney for Petitioner

MAINE SUPREME JUDICIAL COURT

Reporter of Decisions

Decision: 1999 ME 73
Docket: Pen-98-341 CV-96-434
Argued: February 4, 1999
Decided: May 13, 1999

Panel: WATHEN, C.J., and *CLIFFORD*, RUDMAN, DANA, SAUFLEY, ALEXANDER and CALKINS, JJ.

LEON KIRKPATRICK et al.

v.

CITY OF BANGOR

CLIFFORD, J.

[¶ 1] The City of Bangor appeals from a judgment entered in the Superior Court (Penobscot County, *Kravchuk, C.J.*), pursuant to 17 M.R.S.A. § 2851 (Supp. 1998), vacating the order of the City Council to demolish, within 30 days, a building owned by Leon and Gertrude Kirkpatrick that had been declared a danger and a nuisance. The court affirmed the City Council's finding that the building constituted a danger and a nuisance, but concluded that due process mandates that, prior to issuing an order of demolition, the City Council provide the Kirkpatricks with a list of the defects that render the property dangerous and a nuisance, and a reasonable time in which to make repairs. Because we conclude that the Kirkpatricks were afforded adequate due process, we vacate the Superior Court's judgment.

[¶ 2] The Kirkpatricks purchased property located at 30 Highland Avenue, Bangor, in the 1950's, using it as a rental property until 1983. The building was originally divided into five separate apartments with a shared bathroom and no central heating. To meet applicable housing codes for a five unit apartment building, the Kirkpatricks installed central heating and individual bathrooms for each apartment. Mr. Kirkpatrick, a licensed master electrician, has performed most of the necessary maintenance and repairs on the premises.

[¶ 3] The property remained inhabited and in compliance with applicable housing codes until the early 1980's when tenants, responsible for purchasing their own fuel, failed to heat the building, causing the pipes to freeze and burst. Mr. Kirkpatrick, because he owned other "more desirable" investment properties, had health problems, and was medically advised to reduce his stress, chose not to repair the heating system. In 1983, the property was placarded as "unfit for human habitation" for lack of heat. The property has remained vacant since.

[¶ 4] In early 1996, the Bangor Code Enforcement Office notified the Kirkpatricks that it planned to conduct an inspection of the building because it had remained vacant for a significant period of time and there was a possibility of either structural defects or fire hazards. Following inspection, the City Council, on August 29, 1996, notified the Kirkpatricks that a public hearing would be held to "decide whether to condemn the building or structure . . . as a dangerous building. . . . " The public hearing, held October 28, 1996, revealed the following evidence.

[¶ 5] Beginning in 1988, the CEO was required to visit the building 39 times. Although the majority of visits resulted from complaints that the building was unsecured following break-ins, several complaints related directly to the condition and safety of the building.[1] In the CEO's opinion, the building was dilapidated from lack of maintenance. He described the building as obsolete[2] and a fire hazard,[3] and estimated that rehabilitation of the property would cost between $50,000 and $75,000. The Housing Inspector testified that the building had numerous problems, including: structural problems in the foundation, rotted decks, broken windows, missing windows, rotted fascia trim, rotted wood siding, missing steps, rotted steps, no exterior lighting, a rotted porch overhang, and that the building's two chimneys were in a state of disrepair. The driveway had grassed over, there was a retaining wall in the front yard in need of repairs, and the

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[1] On April 19, 1988, a City Council memo noted that the property was rapidly approaching condemnation. On August 2, 1989, a complaint was filed addressing the general condition of the building and yard. In 1993, in response to complaints, the City Council cited the Kirkpatricks for failing to remove junked cars from the premises. In 1994, neighbors complained that the Kirkpatricks failed to mow the grass and failed to remove trash from the yard. In response, the City Council issued an order to clean and mow.

[2] The Kirkpatricks had previously rented the house as a multi-dwelling residence. Because of a change in zoning laws and the loss of its legally non-conforming status, the property may only be used as a single-family or two-family dwelling.

[3] The Bangor Fire Department issued a memorandum stating that because of the property's deteriorated condition, in the event of a fire, the response should be limited to protection of exposure and that no interior attack should be undertaken.

inspector feared that the building was extensively contaminated with lead paint. Moreover, he stated that the interior of the building needed new paint, a new electrical system, new kitchens, and new bathrooms.

[¶ 6] The City Engineer also testified concerning the structure of the building. He stated that there were significant structural cracks in the brick walls that had been recently mortared over and painted, there were signs of recent movement in the front corner of the house, and one wall had a significant bulge. He also noted foundation problems in the rear of the house, a sagging roof, and movement in the rear, wooden portion of the house.

[¶ 7] The Kirkpatricks contended that the majority of structural defects in the building have existed since they purchased it over 40 years ago. They recognized that the building needed repairs, but they offered no time frame in which the property would be rehabilitated. The Kirkpatricks' attorney stated that the housing market was poor and "what is the point of spending a lot of money to fix something up in a poor market." Furthermore, he stated that he wished he could state that "in 6 months x will happen, in 12 months y will happen, and that in 18 months the building will be completely rehabilitated. I can't make that representation to you." The Kirkpatricks stated that they would comply with an order by the City to make some reasonable progress, but offered no specific plan for rehabilitating the building and expressed no intention of completely rehabilitating it in the near future.

[¶ 8] The City Council determined that the building was structurally unsafe and unstable, a fire hazard, and

unsuitable for use as a residence. Accordingly, the City Council adjudged the building to be dangerous and a nuisance, pursuant to 17 M.R.S.A. § 2851, and ordered the Kirkpatricks to demolish the building within 30 days. If the Kirkpatricks failed to demolish the building, the order empowered the CEO to demolish or remove the building at the Kirkpatricks' expense. In response, the Kirkpatricks filed a two-count complaint in the Superior Court, alleging in Count I, brought pursuant to M.R. Civ. P. 80B, that the order was arbitrary, capricious, and not supported by the evidence, and in Count II, that the City Council was taking property without just compensation.[4] In the Rule 80B action, the Kirkpatricks raised three issues before the Superior Court: (1) whether there was sufficient evidence in the record to support the City Council's determination that the building was dangerous and a nuisance; (2) whether the City Council improperly relied on aesthetic concerns when condemning the property; and (3) whether due process requires the City Council to give the property owner a reasonable opportunity to repair the structure prior to an order of demolition.

[¶ 9] The court rejected the Kirkpatricks' contention that the evidence was insufficient to support the City Council's conclusion that the building was dangerous and a nuisance. The court also concluded that the City Council properly relied on public safety concerns when making its determination. The court, however, determined that because demolition of a building is a drastic measure with constitutional implications, the

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[4] The Superior Court found in favor of the City on the claim for a taking without just compensation.

Kirkpatricks were entitled to both a list of the structural defects that rendered the property dangerous or a nuisance, and a reasonable opportunity to make the necessary repairs. The City contends that due process requirements were met by the notice actually given and the hearing actually provided.

[¶ 10] When the Superior Court acts as an appellate court, we review directly the evidence presented at the administrative hearing. *See Goldstein v. Town of Georgetown,* 1998 ME 261, ¶ 5, 721 A.2d 180, 181. Our review of issues of law decided by the Superior Court is de novo. *See Ferraiolo Constr. Co. v. Town of Woolrich,* 1998 ME 179, ¶ 9, 714 A.2d 814, 817.

I.

[¶ 11] A municipality may, after providing a building owner with both notice and hearing on the matter, adjudge a building or structure to be dangerous or a nuisance. *See* 17 M.R.S.A. § 2851.[5] It then has authority to

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[5] 17 M.R.S.A. § 2851 provides that

Whenever the municipal officers in the case of a municipality, or the county commissioners in the case of the unorganized or deorganized areas in their county, find that a building or structure . . . is structurally unsafe; unstable; unsanitary; constitutes a fire hazard: is unsuitable or improper for the use or occupancy to which it is put; constitutes a hazard to health or safety because of inadequate maintenance, dilapidation, obsolescence or abandonment; or is otherwise dangerous to life or property, they may after notice and hearing on this matter adjudge the same to be a nuisance or dangerous and may make and record an order prescribing what disposal must be made of that building or structure.

"make and record an order prescribing what disposal must be made of that building or structure." Id. Nothing in the language of the statute limits the remedies available to the City when ordering what disposal must be made and we have previously recognized the authority of a municipality to order a building or structure demolished after adjudging it to be dangerous or a nuisance. *See Michaud v. Bangor,* 159 Me. 491, 494 (1963) ("The act of demolition, properly premised, was within the ordinant power of the city and was, therefore, not ultra vires"). *See also* EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 24.561 (3d ed. 1989) ("a municipality in the exercise of its police power may, without compensation, destroy a building or structure that is a menace to the public safety or health"). The City therefore had the authority to issue an order of demolition.

II.

[¶ 12] The court determined that, in addition to the notice given and the hearing provided, in order to comply with the due process requirements of Article 1, Section 6-A of the Maine Constitution and the Fourteenth Amendment of the federal constitution, the City was required to provide the Kirkpatricks with a list of the specific defects that render the property dangerous and a nuisance, and grant them a reasonable time to make the necessary repairs.

[¶ 13] The due process clauses of the Maine and federal Constitutions guarantee due process before the

state deprives a citizen of a property right.[6] *See Board of Overseers of the Bar v. Lefebvre*, 1998 ME 24, ¶ 15, 707 A.2d 69, 73. *See also* U.S. Const. amend. XIV, § 1; Me. Const. art. 1, § 6-A. The process due an individual will "vary from case to case . . . to assure the basic fairness of each particular action according to its circumstances." *Fichter v. Board of Envtl. Protection*, 604 A.2d 433, 437 (Me. 1992) (quoting *Secure Env'ts, Inc. v. Town of Norridgewock*, 544 A.2d 319, 324-25 (Me. 1988)). When assessing whether an individual's due process rights have been violated, we analyze three factors:

> [f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and administrative burdens that the additional or substitute procedural requirement would entail.

Balian v. Board of Licensure in Medicine, 1999 ME 8, ¶ 10, 722 A.2d 364, 367 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 356 (1976)).

[¶ 14] There is no dispute that destroying the Kirkpatricks' building, valued by the City for tax purposes in 1997 at $25,600, affects an important private

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[6] "This Court 'has long adhered to the principle that the Maine Constitution and the Constitution of the United States are declarative of identical concepts of due process.' " *State v. Rosado*, 669 A.2d 180, 182 (Me. 1996) (quoting *Penobscot Area Hous. Dev. Corp. v. Brewer*, 434 A.2d 14, 24 n.9 (Me. 1981)).

property interest that implicates due process. *See Michaud v. City of Bangor,* 159 Me. 491, 494-95 (1963).

[¶ 15] Nor is there any dispute that the Kirkpatricks were entitled to notice and a hearing before any action was taken by the City against their property. This is not a case, however, where the municipality failed to provide the property owners with sufficient notice and a public hearing. The City Council notified the Kirkpatricks, almost two months in advance, that a public hearing would be held to determine "whether to condemn the building or structure . . . as a dangerous building. . . . " At the hearing, the City presented testimony from the CEO, the Housing Inspector, and the City Engineer, describing in great detail the structural defects in the building. The Kirkpatricks had a full opportunity to present contrary evidence. The issue presented is, in these circumstances, whether the Kirkpatricks were entitled to be provided with a list of the specific repairs necessary to avoid demolition and a reasonable amount of time to make such repairs. The "fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right which the particular pertinent constitutional provision purports to protect." *McNaughton v. Kelsey,* 1997 ME 182, ¶ 6, 698 A.2d 1049, 1052 (citations omitted). The notice and opportunity for a hearing "must be granted at a meaningful time and in a meaningful manner." *See Armstrong v. Manzo,* 380 U.S. 545, 552 (1965).

[¶ 16] The Kirkpatricks contend that they are entitled to something beyond the notice they were given and the hearing they participated in. Although the individual property interest of the Kirkpatricks is an important one,

and the destruction of property is a drastic remedy that should not be ordered unless absolutely necessary, *Miles v. District of Columbia*, 354 F.Supp. 577, 582 (D.D.C. 1973) (citing *Childs v. Anderson*, 73 N.W.2d 280 (Mi. 1955)),[7] nevertheless, in this case the action taken by the City was justified. Despite their property being "unfit for human habitation" for over 15 years and despite receiving numerous complaints and visits by the CEO, the Kirkpatricks have failed to make a significant attempt at rehabilitating the property. The Superior Court affirmed the finding of the City that the building was dangerous and constituted a nuisance within the meaning of 17 M.R.S.A. § 2851.[8] The Kirkpatricks do not challenge that factual finding. The City provided the Kirkpatricks with an appropriate forum to present a plan of rehabilitation or other alternatives to demolition. The Kirkpatricks failed to present any reasonable plan or alternative. Instead, the City Council was told that a depressed housing market provided no incentive to the Kirkpatricks to repair and restore the property and that they had no specific plan or intention to rehabilitate the building. Indeed the Kirkpatricks could not even guarantee that the property would be rehabilitated in 18 months. Based on

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[7] *See also* EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 24.561 (destruction of property is a "drastic remedy" and therefore must be a remedy of last resort); *City of Minot v. Freelander*, 380 N.W.2d 321, 324 (N.D. 1986) (destruction of property is a remedy of last resort).

[8] The Superior Court, in affirming the findings of the City Council, noted that the record reflected that the building has "structural deficiencies, possible fire hazards and inadequate maintenance".

the evidence before it, the City could reasonably conclude that the Kirkpatricks had no intention to repair and rehabilitate the property. In the absence of such an intent and of a plan to restore the property, the conclusion of the City that demolition was the appropriate remedy was reasonable and due process did not impose on the City the additional duty of providing the Kirkpatricks with a specific list of the necessary repairs.

[¶ 17] If a building is a danger, or constitutes a nuisance, the City has a substantial interest in eliminating that danger and that nuisance, and as long as it comports with due process, the City, pursuant to 17 M.R.S.A. § 2851, may act to remove the building. When, as here, the property has been vacant for years, the property owners have received multiple notices of problems with the building, and they present no plan and express no intention to repair the building at the hearing convened for the very purpose of determining whether the building should be condemned, due process does not require yet another opportunity for the property owners to address the deficiencies. Moreover, imposing on the City in this case, the additional responsibility of providing the owners with a list of the specific repairs sufficient to prevent demolition would be unnecessary and an undue administrative burden, and would allow a dangerous building to remain in that condition for an indeterminate period of time. The determination that the building of the Kirkpatricks is dangerous and a nuisance was made only after notice and a full hearing. No reasonable alternative to the disposal of that building was presented at that

hearing. 17 M.R.S.A. § 2851 authorized the disposal remedy chosen by the City and the due process afforded to the Kirkpatricks was adequate.

The entry is:

> Judgment as to Count II is affirmed. Judgment as to Count I is vacated. Remanded to the Superior Court for the entry of a judgment for the City of Bangor.

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STATE OF MAINE
PENOBSCOT, SS.

SUPERIOR COURT
Docket No. CV-96-434

Leon & Gertrude Kirkpatrick,
Plaintiffs,
v.
City of Bangor,
Defendant.

ORDER ON APPEAL

(Filed May 8, 1998)

This matter is before the Court on a two count complaint, Count I being a Rule 80B Appeal from a decision of the Bangor City Council's issuance of a condemnation order pertaining to a structure owned by the Kirkpatricks and Count II being a count for Taking without Just Compensation. Pursuant to an Order Specifying the Future Course of These Proceedings an evidentiary hearing was held on March 11-12, 1998, on Count II prior to decision on the Rule 80b appeal.

I. Count I Rule 80B appeal

By order dated September 25, 1996, the Bangor City Council ordered that a structure located at 30 Highland Avenue and owned by Leon and Gertrude Kirkpatrick was to be demolished within 30 days. The City Council's order was premised upon 17 M.R.S.A. § 2851 which provides that municipal officers are empowered to make an order prescribing what disposal must be made of any building or structure which has been adjudicated to be a nuisance or dangerous. The City Council's order further provided that if the structure was not demolished within

30 days, the city's Code Enforcement Officer could cause the structure to be removed and all expenses incurred thereby were to be paid by the owner or assessed against the property.

The Kirkpatricks have raised three issues on appeal. They argue first that there is insufficient evidence in the record to support the City Council's finding that the building was a nuisance or dangerous. Second they assert that the City improperly relied upon aesthetic and non-public safety concerns in condemning the property. Finally the appellants argue that as a matter of constitutional law the property owner must be given a reasonable opportunity to repair the structure prior to issuance of a demolition order.

In determining the sufficiency of the evidence in this case, this Court must make an initial determination of the standard of review which is applicable to a case of this nature. The appellant argues that pursuant to the *Ben Avon* doctrine [See *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287, 40 S. Ct. 527, 64 L.Ed. 908 (1920)] this Court should conduct an independent judicial review of the facts. They argue that such an independent review is mandated by the fact that a confiscatory taking is present. However, the *Ben Avon* doctrine is not implicated by this case because the Bangor City Council acted in a quasi-judicial capacity in making its determination regarding the condition of this particular building. The *Ben Avon* doctrine only applies to cases wherein legislatively determined facts are implicated, such as public utility rate-making cases.

The appropriate standard of review in this case is the standard of review applicable to all Rule 80B appeals. This Court must independently examine the record and review the governmental decision for abuse of discretion, legal error, or findings unsupported by substantial evidence in the record. *H.E. Sargent, Inc. v. Town of Wells*, 676 A.2d 920, 923 (Me. 1996). Matters of law are reviewed *de novo. Id.* This standard is in accord with the statutory scheme as set forth in 17 M.R.S.A. § 2852, which provides "An appeal from a decision of the municipal offices [or county commissioners] must be to the Superior Court, pursuant to the provisions of the Maine Rules of Civil Procedure, Rule 80B."

Reviewing the record in this case with the customary deferential review accorded to decisions of this nature, there is sufficient evidence in the record to support the Council's determination that 30 Highland Avenue constituted a nuisance and a dangerous structure. The record evidence supports the conclusions that the building has structural deficiencies, possible fire hazards, and inadequate maintenance. The Council heard from the Code Enforcement Officer, the Building/Housing Inspector, and the City Engineer. While the City concedes that maintaining a vacant building is not contrary to any ordinance or rule, the fact that the building has been unsecured on many occasions was properly considered as evidence of potential dangerousness. Children and/or vagrants could have easy access to such a building creating both fire hazards and possible personal injury concerns.

The next issue for the Court's determination is whether the City Council acted improperly because it considered aesthetics and community sentiment in voting

to condemn the property. A review of the record at pages 23-29 indicates that the City Council was very careful in its review to exclude considerations of aesthetics and community sentiment. The individual City Councilors who asked questions of the citizens who spoke in favor of demolition limited the inquiry to questions about structural deficiencies or use of the property by children or other safety concerns. Viewing the record in its entirety, this Court is satisfied that there was no improper consideration of aesthetics or community sentiment.

The final issue raised by the Kirkpatricks is the most serious in this Court's view and that pertains to the draconian nature of the "order of disposal". It is interesting to note that under the statutory scheme implicated in this case the *municipal officers* are given the option of seeking an order of *demolition* and an award of costs by filing a complaint in the Superior Court. 17 M.R.S.A. § 2851(4). This option is "in addition" to proceedings before the municipal officers.

A logical interpretation of this statutory scheme is that the municipal officers when prescribing "what disposal must be made of that building or structure" are permitted to order either what repairs must be made, what corrective action must be taken, or ultimately that demolition will occur if corrective action is impossible. In *Michaud v. City of Bangor,* 159 Me. 491, 196 A.2d 106 (1963) the Law Court acknowledged that "the act of demolition, properly premised, was within the ordinant power of the city." The statutory scheme itself suggests that in order for demolition to be properly premised there must first be an order "prescribing what disposal must be made of that building or structure."

In those case wherein a dangerous building poses an "immediate and serious threat to public health, safety or welfare", the City may obtain an order of demolition by summary process in the Superior Court. [See 17 M.R.S.A. § 2859]. The fact that the City chose not to proceed under this section indicates that the threat posed by this building is not immediate and serious. It would therefore logically follow that in order for the demolition to be properly premised in this instance and in compliance with the constitutional mandates set forth in *Michaud*, supra, the property owner must be advised of what defects must be cured and given a specific time frame in which to cure those defects.

In the present case the City Council's order for the disposal of the building did not spell out what specific defects rendered the building structurally unsafe, unstable, or a fire hazard nor did it give the landowner an opportunity to correct those defects. The City now concedes at oral argument that the fact that the building is merely unoccupied as a residence is not a basis for an order of demolition. As the demolition of a building is a drastic measure with possible constitutional dimensions, the property owner is entitled to be informed of any alternative disposal which can be made of the building short of total demolition. The record in this case is devoid of any consideration of alternative remedies.

The Court therefore concludes that the matter should be remanded to the City Council to hear further evidence as to what remedial action could be taken to render the structure not dangerous nor structurally unsound. The order of disposal issued pursuant to Section 2851 (3) shall

indicate specific defects which make the building dangerous and/or a nuisance and shall prescribe a reasonable time frame within which repairs are to be completed. The City Council may then order demolition of the building only as the remedy of last resort.

II. Count II Taking Without Just Compensation

The second count of this complaint is premised on the assumption that if 17 M.R.S.A. § 2851 permits the municipal officers to order the demolition of a dangerous building, the municipality must compensate the owner of that building to the extent of the building's actual value. as Section 2859 of the same statutory scheme plainly indicates, an owner is entitled to compensation for the actual value of the building only if it is *wrongfully* removed. If the City's order of demolition is properly premised under the *Michaud* case there is no wrongful taking of property without just compensation.

Based on the foregoing, entry will be:

On Count I, the Rule 80B appeal, the case is remanded to the Bangor City Council for further hearing and issuance of an order of disposal consistent with this opinion. On Count II judgment is entered for the City of Bangor.

Dated: May 8, 1998

/s/ Margaret J. Kravchuk
JUSTICE,
SUPERIOR COURT

Assigned to Councilor Woodcock

September 25, 1996

[LOGO]

CITY OF BANGOR

(TITLE,) Order, Relative to Condemnation of a Structure Located at 30 Highland Avenue, Bangor, Maine – Dangerous Building

By the City Council of the City of Bangor:

ORDERED,

THAT WHEREAS, the Bangor City Council, in its capacity as the Municipal Officers of the City of Bangor, held a public hearing pursuant to 17 M.R.S.A. § 2851-2859 to determine whether or not the structure located at 30 Highland Avenue, Bangor, Maine, on a lot described in a deed recorded in Volumes 1609, Page 107, and Volume 1773, Page 114, Penobscot County Registry of Deeds, owned by Leon E. and Gertrude O. Kirkpatrick, of Brewer, Maine, constitutes a dangerous building within the meaning of said statute; and

WHEREAS, based upon the evidence presented at said public hearing, the Bangor City Council finds that the building or structure in question is structurally unsafe; unstable; a fire hazard; unsuitable or improper for the use or the occupancy as a residence; a hazard to health or safety because of inadequate maintenance, dilapidation, obsolescence or abandonment, and dangerous to the life and property of the inhabitants, of the City of Bangor; and

WHEREAS, the Bangor City Council hereby adjudges said building or structure to be a nuisance and dangerous, as provided in Title 17 M.R.S.A. § 2851-2859,

NOW THEREFORE, by the City Council of the City of Bangor;

ORDERED, THAT said building or structure shall be disposed of as follows:

(1) Said building or structure shall be demolished by the owners, within thirty (30) days of the date of passage of this Order, said demolition or removal be performed in conformity with the Laws and Ordinances of the City of Bangor; and

(2) In the event said structure is not demolished or removed within thirty (30) days as provided above, the City's Code Enforcement Officer may cause said building or structure to be demolished or removed, all expenses incurred thereby to be paid by the owner(s) or assessed against the property in accordance with 17 M.R.S.A. § 2853; and

(3) The owner(s) of said structure shall remove all personal property located therein. In the event that the owner(s) fail to comply with this order, the City's Code Enforcement Officer may remove and dispose of said personal property.

and be it further

ORDERED, That the City Solicitor, or his representative, is hereby authorized to take any and all additional necessary action to secure the demolition or removal of said structure.

IN CITY COUNCIL
September 25, 1996
Motion to Table Passed
Tabled until 10-28-1996

/s/ Gail E. Campbell
CITY CLERK

IN CITY COUNCIL
October 28, 1996
Public Hearing Opened:
Charles Gilbert, representing
the owners of the property,
spoke to the Council as well
as several surrounding property
owners. Staff members gave
testimony regarding the
condition of the structure.
Public Hearing Closed
Motion for passage made and
seconded
Order Passed

/s/ Gail E. Campbell
CITY CLERK

96-391

ORDER

Title, Relative to Condemnation of a Structure Located at 30 Highland Avenue, Bangor, Maine – Dangerous Building

.....

/s/ Edward A. Barnett
Assigned to

/s/ Tim Woodcock
Councilman

BANGOR CITY COUNCIL

REGULAR MEETING OF OCTOBER 28, 1996

TRANSCRIPT

City Councilors Present: Patricia A. Blanchette (Chair)
Christopher Popper
Charles M. Sullivan
James M. Tyler
Timothy C. Woodcock

City Staff Present: Edward A. Barrett, City Manager
Gail E. Campbell, City Clerk
Erik M. Stumpfel, City Solicitor
James D. Ring, City Engineer
Mark Marquis, Housing Inspector

Item No. 96-391 Relative to Condemnation of a Structure Located at 30 Highland Avenue, Bangor, Maine – Dangerous Building (Public Hearing)

Assigned to Councilor Woodcock

Meeting convened at 7:30 p.m. Councilors Absent: Baldacci, Leen and Soucy.

BANGOR CITY COUNCIL MEETING
OCTOBER 28, 1996

Tape 1, Side 1

Blanchette: Good evening ladies and gentlemen. This is a regularly schedule meeting of the Bangor City Council.

* * *

City Clerk: UNFINISHED BUSINESS. 96-391 Order, Relative to Condemnation of a Structure Located at 30 Highland Avenue, Bangor, Maine – Dangerous Building. Councilor Woodcock.

Woodcock: Yes. I would move to open the public hearing on 96-391 and for purposes of opening that hearing would move passage.

Blanchette: Councilor Woodcock, I don't believe your microphone is on.

Woodcock: Well I flipped it up. Let me try it again.

Blanchette: Okay.

Woodcock: Can you hear that?

Blanchette: Yes I can thank you.

Woodcock: Alright. I'm moving to open the public hearing on 96-391 and for purposes of discussion will move passage of 96-391.

Second.

Blanchette: Its been moved and seconded that the public hearing is open. Yes, sir?

Charles Gilbert: Good evening. My name is Charles Gilbert. I represent the owners, Leon and Gertrude Kirkpatrick. It's my view of proceedings that you are now conducting under Title 17 that is the burden if you will of the City to go forward, and so I don't intend to say anything until there's been some evidence put before you from which you might

make a finding relative to support condemnation. So I'm just standing in the microphone so I can be heard at the appropriate time, but I don't think now is the appropriate time for me to say much.

Blanchette: Thank you Mr. Gilbert. Dan Wellington – Code Enforcement –

Dan Wellington: Good evening. Dan Wellington, Code Enforcement Officer. over the past year-and-a-half the Code office has been bringing before you on a fairly regular basis structures which we believe meet the statutory obligation for condemnation under Title 17, and you have before you in your supplemental Packet from this weekend a complete copy of Title 17 which covers dangerous buildings.

To summarize very briefly a dangerous building is one in which the Bangor City Council finds that the building or structure in question is structurally unsafe, unstable, a fire hazard, unsuitable or improper for the use or occupancy as a residence, a hazard to health or safety because of inadequate maintenance, dilapidation, obsolescence or abandonment and is dangerous to the life and property of the inhabitants of the City of Bangor.

This building at 30 Highland Avenue is, Mr. Gilbert pointed out, is owned by Leon and Gertrude Kirkpatrick. It is a property that Code Enforcement has dealt with extensively down through the years and it is a property that has been before this Council before.

In 1981 this property was considered by the Council for acquisition and demolition under the CDBG program. At that time Mr. Kirkpatrick made statements to the Council that this property was to be rehabilitated, and in fact it was occupied from the period of 81 to 83.

In 1983 the Code Enforcement office placarded this building as unfit for human use of habitation, and as such, it has stayed as such from 1983 to date. Your, circulating right now I believe a series of pictures which show various views of the building.

For the period 1988 through the current date there have been 39 occasions that Code Enforcement has had to return to this vacant building. The majority of those complaints have centered on the building being unsecure. The building has suffered continued, has continued to suffer dilapidation as a result of lack of maintenance. It is in a number of regards dangerous even from the outside at this time, and we're going to introduce very quickly some evidence to support our position.

First of all, the building having been vacant for the period of time in question, it has lost several of its uses.

C. Gilbert: Could I just – this is mostly for the record but since you are not sitting as the legislative body but as a quasi-judicial body, I think I have to preserve as I would in a court my objections to the record. We don't feel that any discussion of the zoning issues that Mr. Wellington is starting to get into have anything to do with the statutory

criteria. Whether this could be used as a 8-family house, whether this could be used as a 2-family house, or whether it can only be used as a single-family house is a zoning issue that has absolutely nothing to do whatsoever with any issue before you under Title 17.

Wellington: For the record I would disagree. It goes to the issue, the argument of obsolescence but I'll defer to Mr. Stumpfel.

Erik Stumpfel: Would you repeat that Dan?

Wellington: I believe that the issue of what this building can be used for in relation to what it was previously used for goes to support the position of obsolescence under Title 17.

Stumpfel: I think the Council ought to hear the information and then you ought to have some discussion after the evidence is in as to what the basis of your decision is and make that clear on the record.

Wellington: The opinion which you have before you in your packet from Mr. Hamer, and rather than go through that entire opinion I'll just summarize the last paragraph. "The structure located at 30 Highland Avenue losts its legally non-conforming status in December 1985. Any right to resume the nonconforming status under the '74 Ordinance was eliminated in 1991 when the Land Development Code was enacted. Since the lot has an area of only 7,920 square feet and the structure has lost its legally non-conforming status, the structure cannot be used to house multiple

dwelling units. Since the lot has at least 50 feet of street frontage and an area of more than 5,000 square feet the structure may be used as a single-family dwelling." Again, this was a 4-unit building for up until 1993 when it was placarded.

You also have before you in your packet a Memorandum from the Bangor Fire Department. That Memorandum instructs that the Fire Department recommends that in the event of fire the incident commander evaluate limiting the response to protection of exposure with no interior attack. And this I believe is based largely on the findings of our City Engineer.

Our City Engineer, and again this report in its entirety is in your packet, summarized that in the last paragraph of Mr. Ring's report: "The structure is in overall poor condition with evidence of serious structural problems. I might add that I had previously, and I'm quoting Jim Ring, I previously inspected this structure for condemnation consideration well over 10 years ago when Sandy Smith was Code Enforcement Officer. From my recollection it appears that this building has deteriorated further."

What you have then is a building which is indeed a fire hazard. Your Fire Department recommends not instituting an interior attack in the event of fire in the structure. It is obsolete. It is a 4-unit building that can only be renovated to a single-family dwelling. You have a code record which shows that not only was this property considered

in 1981 for acquisition and demolition, it has been vacant for a period of 13 years. Over that 13 year, well, in the last 8 years of that 13 years, we have responded 39 times to code complaints at that property.

Finally, and although this is not in your record, I had a conversation today with Mr. Martzial. T.J. Martzial is the Community Development's Housing Rehabilitation Coordinator, and in conversation with him we concluded that the renovation of this structure to a single-family home would be in the neighborhood of $50 to $70,000. The reason for the extremely high cost of renovating this structure is largely a result of structural problems which are elucidated in Mr. Ring's report.

We contacted the owner of this building in the Spring of this year and requested that we be let inside to do a reevaluation. We were very upfront with Mr. Kirkpatrick. We said that this evaluation was to determine if this building had reached a point where it had to be brought before the Council for condemnation. Mr. Marquis, our Housing Inspector, conducted that inspection in late April of this year and he's here to answer any questions that you might have or perhaps describe the interior conditions of the building.

I can tell you this, however, both of the heating plants in the structure were allowed to freeze and burst. The exterior of the electrical service has suffered considerable corrosion. The porches are badly damaged and the structural members which

hold the second floor up have pulled away from the front wall, and that's very evident in the photographs that you have there. You see a severe distortion in the front wall. This building has lived out its life expectancy, and although we can be sympathetic to the building owner, I think we have a greater obligation to our citizens and to the neighborhood in general and that obligation is to provide them with a safe neighborhood and a neighborhood which they can continue to improve their properties and maintain the values of their properties in confidence that that value will be there when the day comes for them to sell.

Since we've started this conversation with Mr. Kirkpatrick he has started some cosmetic or preliminary work and I have some photographs that were taken on 10/25 of this year, October 25th, and on September 20th, which show the work that Mr. Kirkpatrick has undertaken this year. This is the extent of the work that has been done on this property in the last 8 to 10 years.

We have, Mr. Marquis is here and he'd be happy to answer any questions that you have relative to the inspection done this May, or I'll be happy to answer any questions that the Council might have.

Blanchette: Any member of the Council wish, have any questions for Mr. Wellington? Any questions for Mr. Marquis? Councilor Woodcock.

Woodcock: I think it might be helpful as we're trying to establish a record here if Mr. Marquis

would provide us with a description of what it is that he saw when he went in the building, what problems he noted, what he thinks might be involved in considering –

Mark Marquis: Would you like me to start with the exterior surfaces or the interior?

Woodcock: Whatever you would like.

Marquis: Visual inspection of the exterior of the property were found to have foundation problems, structural problems, rotted decks, broken windows, missing windows, two chimneys that were in need of repair, rotted facia trim, rotted soffit trim, rotted window trim, extensive masonry work was indeed needed, rotted wood siding, all surfaces needed coatings, missing steps, rotted steps, broken glass, old wooden debris was in the yard. There were no exterior lights. The driveway was grassed over and the porch overhang was rotted. Also I believe, although I did not take a test, that the building has extensive lead problems and there was a retaining wall in the yard that was falling.

The interior of the building pretty much represented what one would see on the exterior sides of the building. In negotiating a set of stairs I found it necessary to hold myself up on the left wall in going up the stairs because they were so crooked and rotted that it was very difficult to negotiate the stairs at all.

The building needs all new surfaces inside; new electrical; new coatings; new kitchens; new bathrooms; just about everything.

Blanchette: Any other questions?

C. Gilbert: Just, I guess, let's not keep, the date of your inspection was when sir?

Marquis: I believe it was the first week of May. I don't have the date. I do have it on my schedule, and I did return to the building again on October 23, 1996 to see if there was any differences in the building. The only changes that did take place were those that Mr. Wellington described a few moments earlier.

C. Gilbert: Thank you.

Blanchette: Mr. Gilbert.

C. Gilbert: Thank you. I'm going to be introducing some exhibits but so as not to duplicate can I ask, do you have a copy of the City of Bangor tax assessment for this building in your packet?

Stumpfel: There is a copy of the front page of the assessors' card, I'm sorry, looks like the second page of the assessor's card.

C. Gilbert: Well, let me go through some of the exhibits and some of the evidence and if that becomes an issue I've got one copy of this card which I can introduce. And I have multiple copies of this. I don't know if it's going to be easier if everybody sees this and includes it as part of your packet, or if you want one official copy for the record, or how you want this.

Popper: Madam Chairman, if things are going to, Mr. Gilbert's going to be presenting evidence I'd just as soon look on rather than compare back and forth.

Blanchette: Fine. Mr. Gilbert.

C. Gilbert: My Exhibit #1 which I'll give to the City Clerk for inclusion within the record is on the bottom of the packet that I just handed to the Councilors, but this is a letter dated February 25, 1980 from your Code Enforcement Housing Inspection Supervisor at the time. And by the way even though the address coming out of Charles Street is different than the address that's referred to here, it's because of I believe anyways because it's on the corner of Charles and Highland. At least that's my understanding. I wasn't there in 1980. This document indicates that as of that date this building was in full compliance with all codes of the City of Bangor, and ironically two years later it was placarded as unfit for human habitation. There's been a total absence of evidence before you to, which you could come to the conclusion that the building is structurally unsafe. Mr. Kirkpatrick and Mrs. Kirkpatrick have owned this building for over 40 years, and these bows in the wall that have been referred to by Mr. Ring have been there. On the interior there's a cabinet that's been hanging there for at least 40 if not longer years that has not pulled away from the wall that you can see clearly was built in to accomplish or to fit that very bow. Because if you look at the

facia board and the woodwork on the cabinet you see that it's either narrower at the bottom or wider at the bottom because the wall isn't straight. So, the mere fact that the wall is bowed is no evidence.

The other thing that I would point out and Exhibit #2 in our packet, by the way, is a letter from 1983 indicating that the City, not 1981 but 1983, indicating that the City was considering acquiring the property, and went out and hired an appraiser, I believe it was Mr. Sherwood at the time, and, but apparently that appraisal must have come back too high because an offer was never made but to acquire this property.

Sometime in about 1984 the property became vacant and it has been vacant but I submit there is nothing in that provision of Title 17 that makes a vacant building illegal, unsafe or dilapidated or otherwise worthy of condemnation.

If you look at the 39 code complaints between 1988 and 1996, you will see that virtually all of the code complaints are code complaints because people have broken into this building and have left it unsecured. They've stolen the copper. They've stolen some of the electrical fixtures. They've stolen whatever was there. But that doesn't make it against the law. And in fact what you'll see from your packet is that every time that Mr. Kirkpatrick was contacted he went over and he secured the building. Similarly, Mr.

Ring's assessment is not the type of assessment, is not the type of evidence, on which you can make a finding that there has been, that this building or structure is structurally unsafe, unstable, unsanitary. As near as we can tell that structure has been there for 140 years.

Now Exhibit #3 of what I've submitted to you on the top is Mr. Kirkpatrick's summary of the money that he spent this year alone, since May 16th of this year, on this property – some $4,000, which interestingly enough $751.04 was taxes. I find it a little ironic that the very same City that wants to condemn this property as unsafe and dilapidated has seen fit to increase the assessment on the property from, it looks like and I'm having a little trouble reading the photocopy, but it looks like it was assessed building only, not land, but building only about $18,000 back in 1990 and it went up to a high of $26,500 in 1993, and is now assessed at $25,600. And again, if you don't have the packet, in your packet, the tax assessment data, your own Assessor notes that the percentage good under your own card is 75% good. And so –

(end of tape)

Tape 1, Side 2

C. Gilbert: – contract negotiations with your firefighters but I can tell you with a great deal of certainty that Mr. and Mrs. Kirkpatrick have absolutely no desire to put any firefighters' life at risk, and if somebody torches that building which is the only way

that it would go up at this point because it's got no electricity and no heat source other than that, they certainly don't want firefighters going inside and risking having anything fall down on them and hurt them. But that's got nothing to do with unsafe or anything. Obviously if a building that is burning is a potential hazard to anybody who goes inside, so it just doesn't, just doesn't cut it there.

What I would suggest is this. I know that the City Code Enforcement Office and the administration have concerns about this building and indeed have concerns about vacant buildings all through the City, but you can't act just on the basis of those concerns. You've got to have positive evidence which you don't have. This City has on the books now BOCA Codes, BOCA Maintenance Codes, the National Electric Code. There's no finding, there's no violation, there's never been anything under any of those codes. Mr., I have in fact, I brought with me a witness. I confess I've only done one of these other condemnation hearings before and they're, each municipality does them a little bit differently but I do have a witness here tonight, Mr. Trommer, who has owned property in the neighborhood and Mr. Trommer why don't you come forward if you would for just a second.

Popper: Mr. Gilbert, can I ask you a question if it's appropriate.

Blanchette: Certainly go ahead, Councilor Popper.

Popper: Do you know the date when this card was filled in? The assessing card that you're introducing as evidence?

C. Gilbert: The only thing I have Councilor Popper is that on, what I believe to be the 2nd page, the page that the photograph is on of the building, it talks about an inspection date of 12/27/88 that said boarded up, can't read the second word because of the photocopy, but I am assuming that that's the date or around that time is when this card was filled out. It doesn't say specifically other than that.

Popper: Thank you.

C. Gilbert: Mr. Trommer, since they're making a record it would be helpful if you would speak into the microphone and just introduce yourself and tell the Councilors the basis of your observations over the years of Mr. and Mrs. Kirkpatrick's property –

Paul Trommer: My name is Paul Trommer and I live at 113 Leighton Street, and I've owned I believe either 4 or 5 houses in that neighborhood over the last 20 years. As a matter of fact, I lived on Charles Street back in the late 70s up until probably 1981 or thereabouts. And I've told Mr. Kirkpatrick for awhile when I saw this proceeding I said what in the world are they bothering you for. I said the house looked like hell. It was in terrible condition back in the late 70s and early 80s. I said you moved everybody out. You cleaned it up. You boarded it up. You've kept the grass mowed. Why are they bothering you? He said well I don't know why. But the place looks better now than it has

in years and years and years, and if I were living across the street from him or something I'd be pleased to have it look the way it does today versus the way it used to be. There are certainly other properties around town that are, that present much more of an eyesore. As far as the structure of, you know, the condition of the building, the structure, I can't comment to that. But I do know that the place looks much better, and for the life of me I can't figure out why in the world a man can't own a house and decide to keep it empty.

Mr. Kirkpatrick bought a place from me out in Plymouth a few years ago. He happens to have that empty too for his own reasons. But that's his choice. It seems to me like something's askew here.

C. Gilbert: Thank you. Does anyone have any questions of Mr. Trommer? Let me just indicate that our perception of the interior and exterior of the structure is different than has been related to you, First of all, if you were to go in there during daylight hours you would find that there is some wallpaper in, up on the second floor that Kirkpatrick put in in the early 1980s that's still there and very much intact. You would find that there's a new roof because there had been a water leak down through, but that water leak, and you can see where it leaked down through. The roof has now been fixed and restored. You would see that there is a substantial amount of sheetrock new in there.

Mr. Gilbert, can I interrupt you?

C. Gilbert: Sure.

Have you gone to the second floor and seen this?

C. Gilbert: Yes I have. I was there today.

And you –

C. Gilbert: Mr. Woodcock, as Mr. Woodcock well knows in these quasi-judicial matters I'm not quite sure that I can testify in these matters, but yes I would invite you to go take a look if that's really an issue because you'll see the sheetrock. You'll see the roof. You'll see the fact that there are more materials there, and this house indeed, I think what Mr. Wellington told you is really the nail in the coffin of the City's case. Because he tells you that for $50,000 and I assume that's contractor price, it's not sweat equity, this house can be rehabilitated. And if that's true and I suspect that it is contractor price and not someone working their own, Mr. Kirkpatrick has been doing this kind of work, I talked to him a little bit earlier, as near as I can tell since 1942 when he first bought his first house, and has slowed down just a bit but it's clear that he has the ability if he wants to fix this up. But like many other property owners, he is in a poor market and what is the point of spending a lot of money to fix something up in a poor market.

He's certainly willing to comply with the provisions of your Property Maintenance Code, which is in your ordinances, Article

10, or Chapter 10, the Property Maintenance Code. I think the Property Maintenance Code of your ordinance clearly contemplates that the City and the owner will get together and will discuss how to properly board up and secure the property. And as long as Mr. Kirkpatrick chooses to do that then that's his prerogative. On the other hand, you know he really actually does want to get around to working on this and fixing it up. And I say that despite the fact that there has been no great amount of work over the last 12 or 14 years except for this year. But one of the problems he has had in the past is that anytime he's brought anything in there of any value with the intent of putting it in there it's been stolen and that's been the bulk of many of the complaints that have come through, the complaints that you see in the book. They're basically unsecured building complaints. And so that's a problem. But I just find it more than a little bit ironic that a building which Your Assessor assesses at $25,000, your Code Enforcement Officer says can be fixed up for $70 – for $50,000, on which Mr. Kirkpatrick has paid taxes this year, last year, and every year for the last 14 years, on a value of about $35,000, or $30,000 total, is a building that should be condemned.

So what I would ask you to do is one of two things: to either outright not pass this Council Order, or at the very least, to table it. And if you table it what I would suggest is, the course that I hope would happen if you table it, is that Mr. Kirkpatrick and I

and the Code Enforcement Office can sit down and figure out what needs to be done to comply with the Property maintenance Code that's already on the books. I think it's a lot less onerous than has been suggested so far, because I think indeed as Mr. Trommer put it, there is nothing against the law in having a vacant building.

Are there any questions? And I will mark, or I will as part of the package submit as Exhibit 4 the property assessing card.

Blanchette: Councilor Popper, then comments from Tyler.

Popper: If I could ask our City Solicitor and I guess while Mr. Gilbert's up at the microphone 'cause his definition may vary. But what is our definition of being legally abandoned?

Stumpfel: As far as the use to which a property is put if it's a non-conforming use which this would be as a 4-family home, as my understanding, once that use is discontinued for a year that cannot be resumed. So it would have to be put back into use into use, in this zone, I believe as a single-family home. I don't know if two families, but a single-family home. On that issue, I wanted to comment further on the obsolescence or abandonment issue. If you look at the statute which is in front of you in my agenda notes for tonight in section 2851 that is the section that Mr. Wellington's quoted which describes what you must find to condemn a building. Among the reasons listed in the statute is that a building is, excuse me, constitutes a hazard to

health or safety because of inadequate maintenance, dilapidation, obsolescence or abandonment or is otherwise dangerous to life and property. So obsolescence and abandonment can be factors that you can consider but they have to be, it has to be a hazard to life, to health or safety because of obsolescence or abandonment. Those facts by themselves do not justify condemnation unless they cause the building to be unsafe.

Blanchette: Thank you. Councilor Tyler.

Tyler: Mr. Gilbert, I think I heard you correctly in the packet of materials you handed us that's got sort of a ledger sheet on the front –

C. Gilbert: Yes.

Tyler: – last sheet of that that was handed to me is a letter that was dated February 27, 1980?

C. Gilbert: Yes. No, that, I'm sorry. Exhibit #1 is the letter from 1980. Exhibit #2 is the letter from '83 and Exhibit #3 is Mr. Kirkpatrick's ledger of this year setting forth the expenses that he has incurred this year maintaining that property, including the taxes. The only thing that he's done, if you look in the very last column where he added up and came up with a total of $3962.59. He reversed labor and supplies. As I understand it, the labor was $2556 and the supplies were $655 as shown in the two column as he's got it over in the corner.

Tyler: That's alright. My question goes to Exhibit 1.

C. Gilbert: Yes.

Tyler: The letter dated February 25th, 1980 refers to 29 Charles Street.

C. Gilbert: Yes.

Tyler: And all of the materials I have in front of me have this as Highland Avenue or 23 Charles. Are we certain that that's the same building?

C. Gilbert: I can't say except that it's been represented to me that it is the same building because that's the building that Mr. Kirkpatrick has owned for 45 years.

Tyler: That's fine. I just want to make sure.

C. Gilbert: I mean I don't want you to think that I represented him in 1980, even though I was practicing back then. I had no involvement. but that's how it been represented to me.

Tyler: Thank you.

Blanchette: Councilor Woodcock.

Woodcock: There is evidence presented in the ledger sheet that you provided to us that this year Mr. Kirkpatrick in May undertook some renovations.

C. Gilbert: I wouldn't call them renovations Councilor Woodcock, but certainly some maintenance.

Woodcock: Maintenance. Is it correct that this is the first time this has been done in 10 or 12 years to this building?

C. Gilbert: I don't think it's totally correct to say there's been absolutely no maintenance. I

think the maintenance has been limited. I know, or at least Mr. Kirkpatrick indicated at one point, he did bring some materials in there with the intent of trying to incorporate it into the building only to have somebody break in and steal it. So whether that counts or not, I don't know.

Woodcock: How long did he leave it there before somebody broke in and stole it?

C. Gilbert: I don't know.

Woodcock: Are we talking about maintenance over the years to the tune of approximately $4,000 a year every year?

C. Gilbert.: Well I think that again depends in part – My understanding is that before he slowed down a little bit, Mr. Kirkpatrick did some of the maintenance himself. Now he obviously didn't pay himself and therefore didn't create a ledger entry saying you know 10 hours at $10 an hour or whatever, but I think that even the record that you have in front of you would demonstrate that there have been periodic signs of activity. In fact, Code Enforcement and/or the Police have gone up there to find out whether the activity is somebody who's supposed to be there or somebody who's not supposed to be there. And they've found both. At times they've found the building open because somebody's broken into it, and other times they found it's open because Mr. Kirkpatrick was up there working.

Woodcock: Those instances where the property has evidently been broken into, do you have

any particular information on the character of these break-ins, or why is it that they occurred?

C. Gilbert: Well if you look through the green book you'll see for example a, on 6/13/91 the Bangor Police Department complained to Code Enforcement that the back shed door had been pried open. I can only speculate as to why people pry other people's shed doors open but I think you could probably speculate on the same basis.

Woodcock: Well actually I wasn't looking for that. Since you're representing Mr. Kirkpatrick I'm interested in if you have any information from him as to the nature of these break-ins.

C. Gilbert: Well as I said, somebody broke in a few years ago and took all the copper.

Woodcock: This is copper that basically was originally outfitted in the house or –

C. Gilbert: Well I don't think so because as you probably know 140 years it probably would not have been copper piping, it was, or certainly copper electric –

Woodcock: Well it was a fixture in the house?

C. Gilbert: Right.

Woodcock: And somebody had to go in and strip it out?

C. Gilbert: Right.

Woodcock: I have to tell you quite frankly I'm very familiar with this neighborhood. This is a neighborhood that is full of residential

dwellings, and some are multi-family and some are single family. And frankly I find it extremely disturbing that this building would lie vacant for such a long period of time, be open to people who would pry the doors open, would be able to go in there and take out evidently at their leisure copper or things that have been left there by the owner to be put in at some time undetermined, and evidently never to have arrived. It's trouble. And I consider based on the record that's been established thus far this vacant building sounds like largely unattended for more than a dozen years, with its both heating plants blown and no plan that I can see on the horizon to bring it back into habitable condition could be a real danger to that neighborhood. And it would not surprise me if we some day read about a situation in which either someone is hurt in that building, a citizen or firefighters here tonight, called into a building that somehow falls apart as they try to put out a blaze that some unauthorized person may have gone in and set. That sort of thing does happen to abandoned property. So there is a question that is raised by the fact that the building is left on a persistent basis vacant, particularly in that kind of a neighborhood. Thus I have that concern. And I would invite you if you can to address them.

C. Gilbert: Well, first of all. When it talks about dangerousness in the statute it seems to me that there are 100 if not a 1000 buildings in the City of Bangor that if a trespasser went in there on an unauthorized basis they

could be putting themselves at peril for things that are going on inside, whether it's the Freeses Building downtown or whether it's any number of the old hangars out at the Airport, or whatever. It's perfectly clear that trespassers can and do hurt themselves. That's not the type of dangerousness I would submit that is contemplated by the provision of Title 17. This building, and again, I don't think that the statute can force Mr. and Mrs. Kirkpatrick to proceed at any particular pace to make the building occupied. I think they have a legal right to keep the building vacant. And you may not like that, and I may not like that, and anyone else may not like it although I have noticed in the record a pretty consistent absence of complaints by the neighbors, the fact of the matter is that if it otherwise complies the mere fact that third parties, trespassers, burglars, whatever, are breaking into this building on a periodic basis and opening it up, I think what's more important is that each time you look at that you see that Code Enforcement has gone back and checked and someone else has come in, and that Mr. Kirkpatrick has come in and has secured the building. So I, I mean if it's a question of posting no trespassing signs, keep out signs, whatever and if you really think that will help keep some of Bangor's better housebreakers out of this building then I'm sure Mr. and Mrs. Kirkpatrick are more than willing to do that. I frankly don't think that that's necessarily it, but I don't

think that just because people have periodically broken into this building that that suddenly makes it, where it's otherwise in compliance, that suddenly makes it a building fit for condemnation. Condemnation, as you know, is a pretty radical government taking of someone's property.

And again you have on this record the idea that this property is, the building alone, let's forget the land, the building is worth $25,000 and that with your own Code Enforcement estimate of about $50,000 to fix it up. You could have presumably a $75,000 house. And I'm sure as I'm not as familiar with the neighborhood as you are Councilor Woodcock, but that has a beautiful view up there looking down onto the City and it is an attractive area. It could be an attractive property.

And so if you enter an order of condemnation you're taking away from Mr. and Mrs. Kirkpatrick that presumed equity of somewhere around $25,000, and I don't think the law permits you to do that lightly. I don't think the law permits you to do it merely because the building has been vacant. Mr. Kirkpatrick may have his own reasons. They may be market reasons, market-driven reasons why it's been vacant. But the fact of the matter is that he has complied with what he's been asked to do which is every time he's been told it's been broken into, he's gone and he's secured the building. This year when they came to him and said we'd like to go in and look because this year we really are going to get

serious about condemning then he went and he spent the 3 or 4 thousand dollars to fix it up. And that building is not in danger of falling down. It is not. It's, in the front it's a brick building so it's actually probably at less risk than fire than 70% of the structures, the wood structures, in the City of Bangor. So it's not the same situation as you have seen on other condemnation cases, and it may well be that the course of action is to work with Mr. and Mrs. Kirkpatrick. It may well be that the course of action is to take the property, to buy the property as was contemplated back in 1982, but I again would submit that condemning it under these facts is not the proper course of action.

Woodcock: Well I would concur with you that this is not a power which is exercised lightly, and I would add however, I listened to your representation in vain for some specific proposal as to how to rehabilitate this property and I find that stands in contrast to suggestions that Mr. Wellington's proposal that this might be rehabilitated for $50,000 is something that we should take into account. I haven't heard a proposal to do that. I see nothing on the horizon. What I see on the horizon is another 12 years, and I disagree with you with respect to this, this is an attractive nuisance in this area. This is a building which is evidently attracting people and it is not being adequately secured if there aren't people in it who are going to watch out for it. And I do believe that it falls within the ambit of the statute that we can take into account that

the building is so situated in the neighborhood that people can, whether with good or bad intent, get into it and cause a problem – either hurt themselves or hurt others, or create a situation in which the public safety forces that the City are themselves placed at risk.

So, I'm not hearing what I need to hear with respect to this building and it is a highly problematical structure in that neighborhood and has been for a long, long, long time.

C. Gilbert: Well I wish I could stand here and say that in 6 months x will happen, in 12 months y will happen, and that in 18 months the building will be completely rehabilitated. I can't make that representation to you. I can say this much that Mr. Kirkpatrick has suggested to me that it is his intention to go forward and in fact, he has made some although relatively minor progress in the last 5 months or so, what I would suggest to you further is that the proper way to do this as you have done in other cases as I understand it, is to give the property owner a reasonable but firm deadline to make some substantial progress. This is as I understand it after all the first time that this particular property has been before you, and my understanding of what you've done in other cases when homeowners or property owners come forward, is that you've been, I don't want to say lenient, but you've at least been willing to say okay we will give you a set period of time.

The unanswered question and the reason I can't be more direct in answering Councilor Woodcock's question is Mr. Kirkpatrick had expressed to me the idea that he would do some of the work himself. As I indicated he's been doing this since 1942 and has some skills and some experience doing it although he has tried to semi-retire and is not doing as much as he used to. I think he also has some ability to spend money and to have third parties do it which would probably be more expensive to him but also get the work done more quickly. What I can't answer here is I don't know what mix it would take, I don't know what mix would satisfy you, and I don't know what mix he would want to put forward. I would suspect that if I were faced with the loss of the property and I had the ability to spend the $50,000 over the course of let's say 3 or 4 years, or 2 or 3 years, then I would do it in the hopes that having spent that I would then have a $75,000 house that I could sell rather than to lose the $25,000 that I've got in it. But it seems to me that that's a little premature.

And what I would suggest, if that's your inclination, is to set a reasonable deadline for some reasonable progress and I don't think it's realistic to hope or expect that the property owner can totally rehab the place in the next 6 months. But I think that if 6 months is your deadline, then you have the right to, by April of 1997, see that x number of thousands of dollars has been spent, that this amount has been, these conditions have been corrected, and so

forth. Because, again, it is our belief and the evidence supports the proposition that the structure itself, despite the bowed wall that's been there for at least the 40+ years that Mr. Kirkpatrick has owned the property, the building is not structurally unsound. And in a lot of ways, as you know Mr. Woodcock, when everything inside such as the old wiring and the old heating has been ripped out in some ways that makes it easier to renovate than when you have to work around everything that's in there or tear it all out. As I say somebody's already done that for Mr. and Mrs. Kirkpatrick so again, I'm not, I'm just not going to say that, I'm not going to make a promise that these folks can't keep and say that if you give them 6 months they're going to renovate it totally but if you give them 6 months and they know that's the deadline,–then I think that you will see some substantial upgrading and progress and by the time 6 months will have passed you know, if it doesn't happen, it doesn't happen.

And that way I think your legal position will be a lot clear than it is tonight. And I would again submit that's in keeping with what you've done in other cases.

Blanchette: Councilor Woodcock, are you finished?

Woodcock: I'm all done thank you.

Blanchette: Okay.

Woodcock: Thank you Mr. Gilbert. Thank you.

C. Gilbert: Any other questions.

Blanchette: Yes, Councilor Popper, you were next. Then Councilor Sullivan.

Popper: Thank you. Mr. Gilbert, you've been referring to the card that you were talking about earlier.

C. Gilbert: Yes.

Popper: Wait a minute, unfortunately the Assessor is not here but under physical condition which is on the bottom center column does that look like a 1 to you?

C. Gilbert: To be honest with you number 1 I've given my copy of the assessment to the Clerk, and number 2 my photocopy was not reproduced very well and I couldn't make out an awful lot of what those handwritten numbers were.

Popper: Will you give him back a copy a minute.

C. Gilbert: What I'll try to is get the original.

Popper: That'd probably be good.

Wellington: Map 32, Lot 31 I believe.

Popper: Madam Chairman may I propose a 5 minute recess while we get the card?

Blanchette: There will be a recess for 5 minutes.

Popper: Thank you.

5 minute recess

Blanchette: Okay, we're back in session. Just for the record we do have the original assessing card from the Assessing Department that I

think's going to answer the questions. Mr. Gilbert, have you had a chance to see this?

C. Gilbert: Yes I have. Councilor Popper has the card and I think it indicated that the percentage good was 75% that was the assumption. Physical was 0 and economic was 100% whatever that is – could I just mention a couple of things that came up during the break.

Blanchette: Certainly.

C. Gilbert: Number one, Mr. Kirkpatrick is a licensed master electrician and has been so that's one of the reasons that he's maintained the interest in being able to do some of the work himself. Mr. Woodcock asked earlier if work other than this year had been done, and one thing that I forgot to mention which you would notice, the front of the structure is brick and the back is a wooden shed. And several years back the wooden floor of the shed was sagging and so a cement, a cement floor has been poured to take care of the sagging wood floor. This probably also stabilized that structure at the back, and so I think I can answer a little more definitively to Councilor Woodcock that yes, work has been done other than in 1996.

Blanchette: Councilor Popper.

Popper: Mr. Gilbert. I just want to read some of these things off just for the record I guess. The date inspected on this on the card was 2-19-86. It has here physical condition a "1" which means poor. It has interior condition a "2" which indicates it's similar to

the exterior. Number of modern kitchens and baths, which is the fourth column down in the center, both are zero. And it certainly would have been helpful had I guess the Assessor gone up and reinspected this prior to this, but I guess it gives, at least for the record a time frame and a conditional inspection in terms of a physical and interior condition of perhaps some strategies.

C. Gilbert: Well as Mr. Trommer indicated in a lot of ways it looks better now than it did. In fact if you took a drive by today or tomorrow you would see that it doesn't fit the whole of what you would, of what you would commonly characterize as a slum-type building that's on the verge of falling down. It's a rather imposing structure. It's had some cosmetic work done in addition to what I mentioned earlier the porch decking, the rotting boards there have been replaced. I was walking on them this afternoon and I can assure you I wouldn't have walked on them if I was going to go through 'em and similarly the stairs going up the back, although there's no question that some work would need to be done, they were certainly passable.

Popper: Are those the stairs that Mr. Hamer – uh, Mr. Marquis described?

C. Gilbert: I don't know. I didn't go in the stairs in the front part. In fact, one of the things that's happened is that to prevent unauthorized people from getting in to the front part that portion of the stairway, wooden stairway, has been cut off so that

basically they can't reach it. So I don't know if we're talking the same stairway or not.

Popper: Thank you.

Blanchette: Councilor Sullivan.

Sullivan: Yes. I'd like to direct a question to our legal beagle. Having heard all the evidence that has been presented here tonight, do you think that there is at this point enough evidence for the City Council to condemn the structure at 30 Highland Street as a dangerous building?

Blanchette: City Solicitor.

Stumpfel: Taking the question to mean, could I defend a finding on appeal I believe I could. There's a very deferential standard that would be applied on appeal. You'd need substantial evidence in the record, and I think that standard has been met. I say that with the caveat that it's up to you to make the finding and I'm not here to advise you one way or the other way. Your finding should be on what the quality of the evidence before you is.

Sullivan: Having heard that it is my intention to support the order 96-391 as proposed by our Code Officer.

Blanchette: Dan Wellington.

Wellington: Dan Wellington. I was handed a note. We do have another citizen here who would like to speak, a resident of the area, Mrs. McTigue, and I just thought it appropriate to –

Sullivan: I'm sorry.

Blanchette: Okay. Mrs. McTigue, if you'd like to come up to the microphone and just give us your name and address for the record please.

Pam McTigue: My name is Pam McTigue. I live at 69 Highland Avenue, and I'm here as a property owner and I have a list of other property owners who have signed a petition stating "We the undersigned citizens and taxpayers of Bangor strongly urge the City Council to vote for the immediate disposal and demolition of the structure located at 30 Highland Avenue." And I'd just like to read the names into the record: Pamela McTigue, Michael McTigue, Jana Stabile, 53 Highland Avenue; Gregory Dorr, 53 Highland Avenue; Michael Alpert, 58 Highland Avenue; Denise Costello, 44 Charles Street; Robert Merriam, 24 Highland Avenue, Apt. 1; David Carr, 49 Charles Street; Jay Michaelson, 74 James Street; Michael Aube, 48 Highland Avenue; Marilyn Aube, 48 Highland Avenue; and Gwendolyn Winchell, 64 Thomas Hill. And these were names I got in less than an hour. I didn't have a lot of time to spend on this.

Blanchette: Could I ask you to submit that to us for the record so it will be part of the record?

Pam McTigue: All the people are property owners and citizens of Bangor. We live on that street in that neighborhood. We go by that building every day. I beg to differ as an opinion as to whether this structure is pleasing to the eye, or debilitated to the point of removal.

As the former Executive Director of the Historical Society, I wouldn't urge any building that had any redeeming value to be demolished. I don't believe this one does. I believe it's a blight on the neighborhood. I believe it devalues all our property. I believe it's an accident waiting to happen, and I don't believe that 15 years is an inadequate amount of time in order to have made some sort of progress and I don't believe that it should take another 15 years to bring this up to code, and I feel that having demolished the building possibly somebody would build a single family structure on it that would look much better and much in keeping with the neighborhood because right now it's just a warehouse that's boarded up.

Blanchette: City Solicitor, do you want to –

Stumpfel: I just do want to caution the Council while you receive citizen petitions on other subjects, and properly so, this really isn't an issue to be decided by citizen petition. What you have to do is make a decision about the condition of the building based on the information you've received about the condition of the building. The aesthetics also are really not relevant to whether it's dangerous under section 2851. So I just want to place that advice on the record so that you don't give this petition undue weight in that respect.

Blanchette: City Solicitor Stumpfel, I just asked the lady if she would submit it so that the City Clerk could get the names down. Mrs. McTigue ran through them rather

fast and sometimes it's hard to pick up the names on the mike so if you don't believe we should have it in our possession I can give it back to her.

Stumpfel: Well it's already been read into the record so the effect of having it is no different than just having heard it, but again your decision tonight must be based on the factual submissions you've heard about the condition, the physical condition of the building under the statute and you're not really taking a citizen vote as to whether this building should continue to remain at its location or not.

Blanchette: Okay. Councilor Woodcock?

Woodcock: Yes I do have one question of you. In the course of your description of the presence of this building in the neighborhood you described it as an accident waiting to happen.

Pam McTigue: Yes.

Woodcock: What did you mean by that?

Pam McTigue: It's a vacant building. It's boarded up. It is obviously vacant. It isn't a situation where somebody has a piece of property that they're not living in or they're an absentee landlord. This building just screams out that it's vacant. It's, there is a car there that looks like it's a junked vehicle. In going around asking the other neighbors what they thought – I haven't lived in the neighborhood as long as some of them – I spoke to a gentleman who had lived there all of his life. He gave me a rundown of some of the activities that had occurred in

that building including it being used for various illegal drug deals; vagrants were living in it. It's just, those of us who own property in that neighborhood have chosen to live there and raise our families there and be part of a neighborhood, resent the fact that somebody who is not living in the neighborhood has a building in this condition, has been permitted to continue to have it in this condition, and you know is now after 15 years of this suggesting possibly they could work something out. It seems to me that somebody would have worked something out sooner than this, and spending approximately $213 a year, which is what $4,000 less the taxes paid over 15 years, amounts to does not seem like it's an adequate amount for anybody who owns a building to spend on.

And basically it's being used I believe as a warehouse and that's not a permitted use in that neighborhood and it's not in keeping with the complexion of what it's intended to be and what it's trying to be.

Blanchette: Councilor Woodcock, the City Solicitor wanted to make a comment.

Stumpfel: Again I want to caution you while you're allowed to receive hearsay evidence because you are sitting as an administrative hearing board and not as a court, that must be reliable hearsay and I would caution that you, with apologies to Mrs. McTigue, that comments about the house being used for drug dealing and that sort of thing from an unnamed third party

source really is not evidence that you should consider at tonight's hearing especially absent any police reports to indicate that.

Woodcock: As a resident of that neighborhood can you give me some idea as to the number of children in that neighborhood?

Pam McTigue: I don't live on Charles Street and I believe there are quite a few more children on Charles Street. We have a son. The, there are two daycares located on Charles Street alone that I'm aware of. There are numerous multi-family units there that I'm sure contain children. Some of the people that signed the petition, the Aubes have children, they're two houses up from that building. There, you know, I really can't give you a number of children but it's a family area and there are children in the neighborhood.

Blanchette: Anyone else have any comments they'd like to make to Mrs. McTigue? Have you finished your statement?

Pam McTigue: Uh-huh.

Blanchette: Thank you very much.

Pam McTigue: You're welcome.

C. Gilbert: I think for the record I have to ask that all of that evidence be stricken from your consideration. I basically think that's what Mr. Stumpfel told you in a nice way, but I think that none of that – this is not a zoning board. This is not a planning board hearing. You are sitting quasi-judicial and the evidence that the neighbors don't like

this is totally completely irrelevant to the statutory criteria. I would also note the absence, at least in my quick reading of the summary here, the total absence of any mention in the 39 code complaints that are supposedly on record here of any children being caught in, on or around this structure. In fact, I would note that the last thing that is in your packet says that, dated July 3rd, if I'm reading the date correctly, July 3rd '96 that the property's been open and has been resecured. I mean you know, I think you're setting or getting awfully close to setting an impossible standard when the evidence shows that when the owner is told that somebody has gone in and opened it up and he goes and resecures it. What's the City of Bangor been doing with the waterworks all these years? I venture to say there's been a lot more people in there. I mean it's, that the City didn't spend hundreds of thousands of dollars to buy steel doors and 24 hour security guards. And that's not the standard.

Blanchette: Thank you Mr. Gilbert. Mrs. McTigue you want to make a comment?

Pam McTigue: My opinion I believe was in answer to a statement I believe Mr. Gilbert made that there had been no complaints from neighbors. You have complaints from neighbors, and I'm here to verify that and those signatures on that sheet are here to verify that. So he is the one who introduced this whole section of discussion, and I'm just here to verify that the neighbors aren't

pleased with it. He had a neighbor come speak that there wasn't a problem and now you have a list of property owners and neighbors speaking to say that there is a problem. And I understand that this is not part of the official record but it was in answer to a statement that he made.

Blanchette: Councilor Tyler, Mrs. McTigue.

Tyler: Before you leave. Earlier in your comments you refer to the use of this building as a warehouse. What direct knowledge do you have that that building is indeed used for that use?

Pam McTigue: I spoke to the Code Enforcement Officer who informed me that appliances were in there. Mr. Aube who lives two houses down –

Tyler: But you have not directly seen personally any such activity?

Pam McTigue: I've seen appliances outside that then disappear and I'm assuming that either they were stolen or they were put inside. That was the purpose in them being there.

Tyler: Okay, okay. Thanks.

Blanchette: Any other questions? Councilor Tyler.

Tyler: Yeah, I'd like, Dan could you address that same question. What knowledge do we have that that building has been used for warehousing?

Wellington: Historically when I have gone to the property over the years there has been a large number of appliances and furniture stored in that building. That's not inconsistent

with the history of other Kirkpatrick properties.

C. Gilbert: Wait, wait a minute, whoa, whoa –

Tyler: I don't want to know that.

C. Gilbert: That needs to be stricken from this record. That's just totally prejudicial to introduce anything else as to any other property.

Okay.

C. Gilbert: And I must really –

Blanchette: Mr. Gilbert just as a matter of record. This is a public meeting and everything that is said here is recorded and kept on. It is not a trial. We're not in a court. We're not at liberty to strike remarks from the record.

C. Gilbert: But you have to indicate that you can't consider it as Mr. Stumpfel –

Blanchette: And we're aware of that.

Tyler: Understood. And I won't consider it. Dan, with respect to the property at hand only, what knowledge do you have with respect to warehousing in this building?

Wellington: My personal experience has been that there are appliances, refrigerators, stoves and other furniture that have been historically stored in this building since 1983.

Tyler: Thank you.

Blanchette: Thank you. Sir, would you give us your name and address.

Robert Merriam: Yeah, my name is Robert Merriam. I'm one of the people on that list. I reside at 24 Highland Avenue and my apologies to the two attorneys who would not like to hear our opinions. We must give them. Every morning when I go out my door I look at this house. Before the owner put shutters on the window, I could see appliances through the windows, some broken windows and so forth, I could see what appeared to be appliances, white fixtures of some type, appeared to be washers, dryers, refrigerators or something. I believe as of today may be gone but there was a bathtub laying up the side, outside; the automobile has been removed in the last couple of weeks. The deck which you walked across today did have some planking put on it last week, and it was propped up so probably you were safe during that time.

I have nothing against the brick structure of this house. It has some history to it. It theoretically could be renovated I think. I think the City's estimate of $50 to $70,000 is a little bit optimistic to make that habitable but I'm not a contractor so I couldn't say for sure. But I am, I feel very insecure living across from that house. There are doors on it now. I had something stolen from my porch the other night, and my first reaction was to call the Bangor Police Department and ask them to please come over and check the building to make sure that it's secure. That may be a little bit paranoid. I don't know. It clearly in my

opinion, the owner has shown no serious intention of using that building as a residence. He's had 18 years 15 years whatever, and has not shown, putting $4,000 into that in that period of time is nothing. The landlord of my home happens to be my son. We've lived there since last spring and in the first 6 months that we lived there he had put over $5,000 into a new roof and so forth on our house. So that doesn't make me feel that this owner is serious about putting that back into a home. I would love to see the place fixed up. it just doesn't seem likely that it's going to happen. But I do want you gentlemen to know we do feel insecure having that house the way it is in the neighborhood. Thank you.

Blanchette: City Solicitor Stumpfel.

Stumpfel: Once again I'm going to caution you that the gentleman's remarks include a mix of observation and opinion and feelings, I'd ask you to disregard the opinion and feelings to the extent that they're relevant to this issue and consider the observations that have been reported to you.

Blanchette: Thank you. Any more questions on this Order before us? Councilor Tyler.

Tyler: Can I have the City Engineer Jim Ring –

Blanchette: Excuse me. (end of tape)

TAPE 2, SIDE B

Tyler: – 1996 to Dan Wellington regarding the property at 30 Highland Avenue. I note at the end of paragraph 1 you state the

building appears to be vacant, has numerous visible structural deficiencies and is in generally poor condition. Could you elaborate on the numerous visible structural deficiencies please?

Jim Ring: Yes certainly. I think you've seen the photographs and you've heard a lot of discussion and description about you know the regular, relative structural integrity. My observations of the masonry portion as I've indicated further in my Memo is it appeared to me that there had been at least in recent years some what I would call fairly significant structural cracks that had been mortared in and then painted over. Now whether that was in the last year, two years, I don't know. Moreover, the support in the front corner which should be the corner facing the intersection of the two streets it looked to me and I spent quite a bit of time looking at this, that there was signs of recent movement on that corner and there's a post on the corner and kind of, on the lower floor is sort of cut off if you can visualize that with a door at a, well, 45.

And there's a large steel post there that supports I think its two stories of brick structure above that. Again, my observations on my visit at that date were such that I believe there's some movement occurring there. Now the bulge in the wall that I referred to it may have been there, but it seems to me that there has been movement over some period of time.

The other things that I had mentioned and observed were distortion of the roof planes, the back wall in particular of the foundation problems, which I guess there have been some repair work started or completed here fairly recently. The wooden portion of this building which appears to be an addition, probably subsequent to the original brick structure, you know that, it is very obvious that there's been movement in that. I looked a lot of these. You look at the roof plane sagging, I wasn't even to inspect the interior of the building because I assume it was secured but I did not have permission to enter and did not. But when I see distortion such as this, other times when I have looked at such buildings, there's always, you know it's indicative of movement and structural problems you know interior support.

Tyler: And just quickly for the record, to your credentials. You're a registered professional engineer in this State. Is that correct?

Ring: Yes.

Tyler: And your discipline is civil?

Ring: Yes.

Tyler: Which would include structural analysis and design. Thank you.

Blanchette: Any other questions? Okay, there is a motion and a second for – Councilor Woodcock?

Woodcock: I would simply note for the record, I'm going to support this order and I would

note in reviewing the record that has been provided for us, that dating back to April 10, 1990 or April 10, 1988, the City Police Department received a report of finding children in the building. On May 18 of 1988 the Police found the building open with vagrants inside. The record is full of a number of instances in which the building has been found open, evidently unauthorized, and even though the owner has secured it the building has been found open again.

Evidently the state of abandonment is such that people can enter the building and strip it of its wiring and copper outfittings without being disturbed. Materials that have been brought in there to repair it are spirited away before the owner for beyond some undefined time frame has been able to put those materials to use.

I take into account the comments made by City Engineer Ring and his letter in which he set forth the structural deficiencies of the building. This building is a dangerous building and it has a history in which the owner has resisted efforts over the years to make it safe, and to put it back within the framework of the neighborhood of which it is a part. And it remains a dangerous building. So for that reason I'll support the Order.

Blanchette: Okay. Councilor Popper.

Popper: I guess for the record I'd like to close the public hearing.

Second.

Blanchette: Okay. The public hearing is closed. Is there a motion on the floor and a second –

There is.

Blanchette: – for the passage of Council Order 96-391? It's going to be a vote unless doubted. It's a vote.

City Clerk: 96-403 Resolve . . .

CERTIFICATE

I hereby certify that the foregoing, consisting of 31 pages, is a verbatim transcript prepared by me from two micro-cassette tape recordings of a portion of a regularly scheduled meeting of the Bangor City Council conducted on October 28, 1996 at 7:30 p.m. Said transcript concerns Council Order #96-391 entitled "Relative to Condemnation of a Structure Located at 30 Highland Avenue, Bangor, Maine – Dangerous Building."

Dated: July 10, 1997

/s/ Terri L. Corey
Terri L. Corey
Secretary
Bangor City Hall
73 Harlow Street
Bangor, ME 04401
945-4400, Ext. 305

30 HIGHLAND AVENUE

1981	1983	1988	1996
Property considered for acquisition and demolition	Placarded as unfit for human use and habitation	File records for 39 code complaints	

30 Highland Avenue – Code History

7/3/96	Property resecured after vandalism.
6/25/96	Owner notified in writing to secure building.
6/22/96	Owner notified by phone that Police have found property open.
4/17/96	Request to inspect – potentially dangerous building.
3/14/96	Request to inspect building – potentially dangerous building (second request).
4/8/96	Property resecured.
4/1/96	Owner notified by letter to resecure property.
3/29/96	Property found open by Police Department. Owner notified by telephone.
1/24/96	Owner notified by letter to resecure property.
1/20/96	Property found open by Police Department. Owner notified by phone on 1/21/96.
11/20/95	Written order to secure building (Secured by 12/6/95).
11/18/95	Police report building found open. Owner notified by phone.
11/17/95	Police report building found open. Owner notified by phone.

3/27/95	Written order to secure building.
3/25/95	Police report building found open.
12/18/94	Police report building found open. Resecured 12/19/94.
6/28/94	Neighbor complains grass not mowed and trash on property.
6/17/94	Written order to clean and mow.
6/15/94	Complaint of tall grass blocking motorists vision.
1/10/94	Neighbor requests unregistered car be moved to facilitate tree work. No response to request.
1/4/94	Notice of reinspection and continued violation – junked cars.
12/3/93	Owner cited for junked cars.
12/1/93	Complaint of junked cars on lot of placarded building. Letter sent 12/2/93 ahead of violation notice.
5/20/92	Owner cited for vacant/unsecure structure. Not satisfactorily secured until 6/29.
2/28/92	Found open; letter sent 2/28/92.
6/13/91	Found open by Police Department; letter sent 6/13/91.
11/14/90	Water District asks Code to assist in recovery of meters – attempts to BWD to work with the owner had been unsuccessful.
9/21/90	Rear of structure found open; letter sent 9/21/90.
8/16/90	Work being done to "shore-up" rear of building – structure also unsecure.

8/9/89	Letter sent to express concern about exterior and premises maintenance – lawn mowed 8/11/89.
8/2/89	Complaint about condition of building and grounds.
7/3/89	Complaint about junked cars.
6/16/89	Fire Department alleges people living in the building – unfounded.
11/1/88	Building checked and found secure – two earlier complaints of the building be open closed out.
5/18/88	Police found building open and vagrants inside; owner notified and building secured.
4/19/88	Memo detailing continued dilapidation of structure.
4/10/88	Police report finding children in the building.
3/17/88	Letter sent to owner about building being left unsecured.
3/15/88	Written notice sent to owner ordering building be secured.
3/15/88	Building found partially open.

Documentation between 12/84 and 3/88 is no longer contained in the file for the property.

Nov./Dec Building was determined to be unfit for human habitation and placarded.

1981 Community Development brought this property, with two others, before the Council, for acquisition and demolition. Mr. Kirkpatrick committed to rehabilitation of the property and the Council decided against continuing the acquisition proceedings.

CITY OF BANGOR

MAP 32 LOT 31 ACCOUNT NO. 77140 ADDRESS 30 HIGHLAND & 23 CHARLES CARD NO. OF

PATRICK LEON E & GERTRUDE J JT MAP
EASTERN AVE 32
BANGOR ME 031
04412
PRIV16C9P107V1773P114 77140

NOTES

LAND VALUE CODE	96 1 1
NEIGHBORHOOD CODE	2 2
LAND CLASS	1
BUILDING CLASS	2 1
STREET CODE	2 2 2
X COORDINATE	2 2 2
Y COORDINATE	2 2 2
PROPERTY FACTORS	
ZONING (10-A, 11-R1, 12-R2, 13-R3, 14-R4, 15-R5, 19-R1A; 21-C1, 22-C2, 23-C3, 24-C4, 31-11, 32-12, 33-13; 41-AP, 42-C+I, 43-P+O, 44-RP, 45-OTHER)	1 1
SECONDARY ZONE	2 2
TOPOGRAPHY (1. LEVEL, 2. ABOVE STREET, 3. BELOW STREET, 4. ROLLING, 5. STEEP, 6. LOW, 7. SWAMPY)	— —
UTILITIES (1. ALL PUBLIC, 2. PUBLIC WATER, 3. PUBLIC SEWER, 4. WELL, 5. SEPTIC)	— 2
STREET OR ROAD (1. PAVED, 2. SEMI-IMPROVED, 3. UNPAVED, 4. PROPOSED, 5. NONE)	—
TRAFFIC FLOW (1. NONE, 2. LIGHT, 3. MEDIUM, 4. HEAVY)	2
ENVIRONMENT (1. IMPROVING, 2. STATIC, 3. DECLINING, 4. BLIGHTED)	—
ENCROACHMENTS (1. NONE, 2. MINOR, 3. MAJOR)	—
SALE DATA	
SALE DATE MO/YR	— —/— —
SALE PRICE	— — —, — — —
TYPE (1. LAND, 2. LAND & BUILDING, 3. BUILDING ONLY, 4. OTHER, 5. MO HO)	—
VERIFIED (1. BUYER, 2. SELLER, 3. AGENT, 4. OTHER, 5. NONE, 6. MLS)	—
VALIDITY (1. VALID, 2. INTER-FAMILY, 3. FORECLOSURE, 4. LIQUIDATION, 5. SPLIT, 6. ASSEMBLAGE, 7. UNDIV. INT., 8. EXEMPT, 9. OTHER)	—

ASSESSMENT RECORD

YEAR	LAND	BUILDINGS	EXEMPT	TOTAL
19				
1988	3,300	21,300	0	25,100
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
1991	5,000	26,500	0	31,500
1992	5,500	26,500	0	32,000
1993	5,500	26,500	0	32,00
1994	5,500	26,300	0	31,800
1995	5,500	26,300	0	31,800
1996	5,500	26,300	0	31,800
1997	5,500	25,600	0	31,100
	32-031	77140		
19				

LAND DATA

	TYPE	EFFECTIVE Frontage	EFFECTIVE Depth	INFLUENCE FACTOR	INFLUENCE CODE
FRONT FOOT	1			%	
11=REGULAR LOT 12/88	1	060	132	100 %	1
12=VIEW	1			%	
13=REAR LAND	1			%	
14=DELTA TRIANGLE	1			%	
15=NABLA TRIANGLE	1			%	
16=WASTE					
SQUARE FEET		SQUARE FEET			
21=REGULAR LOT	2			%	
22=SECONDARY	2			%	
23=UNDEVELOPED	2			%	
24=RESIDUAL	2			%	
25=REAR LAND	2			%	
26=WASTE	2			%	
ACREAGE		ACREAGE			
31=HOMESITE				%	
32=BASELOT				%	
33=HOMESITE(FRAC)				%	
34=BASELOT(FRAC)				%	
35=VIEW				%	
36=CONDO				%	
37=SECONDARY				%	
38=FRONTAGE				%	
39=REAR				%	
41=WASTE					
42=TG.SOFT					
43=TG.MIXED					

INFLUENCE CODES

1=UNIMPROVED
2=EXCESS FRONTAGE
3=TOPOGRAPHY
4=SIZE/SHAPE
5=MISIMPROVEMEN
6=RESTRICTIONS
7=CORNER/ALLEY
8=VIEW
9=FRACTIONAL SHARE

96-391

BEST AVAILABLE COPY

BUILDING RECORD

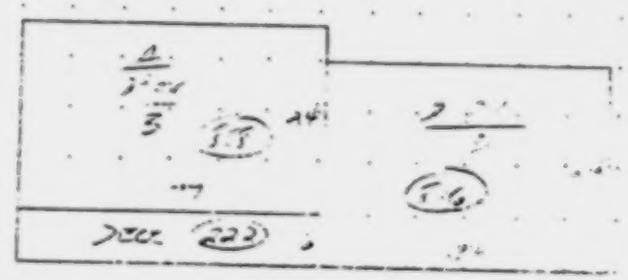
MAP 32 LOT 31 ACCOUNT NO. 77140 ADDRESS 30 HIGHLAND & 23 CHARLES CARD NO. OF

BUILDING CLASSIFICATION	
1. DWELLING 4. LAND 2. OUTBLDGS 5. MO HO 3. RES/COMM 6. CONDO	1
STYLE	
1. GARRISON/ GAMBREL 5. CONV 6. CAPE 2. CONTEMP 7. RANCH 3. SPLIT LEV 8. R/R 4. SOLAR 9. OTHER	5
SETBACK	
1. STANDARD 3. DEEP 2. CLOSE	1
NUMBER OF UNITS	
DWELLING	04
OTHER	02
STORY HEIGHT	2.2
EXTERIOR WALLS	
1. AL/VINYL 6. WOOD 2. STONE 7. BRICK 3. ASBESTOS 8. COMP 4. STUCCO 9. OTHER 5. CONC.	1
ROOF MATERIAL	
1. ASPHALT 4. COMP 2. WOOD 5. METAL 3. SLATE 6. OTHER	1
YEAR BUILT	1933
YEAR REMODELED	2222
FOUNDATION	
1. CONC. 5. SLAB 2. C.B. 6. PIERS 3. WOOD 7. OTHER 4. BRICK/STONE	1
BASEMENT	
1. 1/4 BMT 4. NONE 2. 1/2 BMT 5. CRAWL 3. 3/4 BMT 6. FULL	3
BASEMENT FLOOR	
1. CONCRETE 3. JOIST 2. EARTH	172

BASEMENT HEADROOM	
1. ADEQUATE 2. INADEQUATE	—
WET BASEMENT	
1. DRY 3. WET 2. DAMP	2
HEATING	
1. ELECTRIC 6. FWA 2. HEAT PUMP 7. GRAV. 3. STEAM 8. H.W. 4. SOLAR 9. NONE 5. FL/WALL FURNACE	22 % 1
NUMBER OF MODERN	
KITCHENS	02
BATHS	03
LIVING ACCOMMODATIONS	
BEDROOMS	06
FULL BATHS	02
HALF BATHS	02
ADDITIONAL FIXTURES	02
LAYOUT	
1. TYPICAL 2. INADEQUATE	—
ATTIC	
1. FULL FIN 4. 3/4 FIN 2. 1/4 FIN 5. UNF 3. 1/2 FIN 6. NONE	2
INSULATION	
1. NONE 4. FULL 2. MINIMAL 5. HEAVY 3. CAP	—
INTERIOR CONDITION	
1. INFERIOR TO EXTERIOR 2. SIMILAR TO EXTERIOR 3. SUPERIOR TO EXTERIOR	2
PHYSICAL CONDITION	
1. POOR 4. GOOD 2. FAIR 5. EXCELL 3. AVERAGE 6. INCOMP	1

OTHER FEATURES	
S/F BRICK/STONE TRIM	2222
BMT LIVING AREA	2222
GRADE (1-6)	2.22
NO. OF FIREPLACES	02
NO. OF STACKS	2
BMT GARAGE NO. OF CARS	02
UNF. AREA	22 %
GROUND FLOOR AREA	672
GRADE FACTOR	2
1. E 4. B 2. D 5. A 3. C 6. AA	100 %
PERCENT GOOD	
PHYSICAL	02 %
FUNCTIONAL	075 %
ECONOMIC	02 %
INSPECTION DATA	
ENTRANCE CODE	
1. INSPECTED 2. UNIMPROVED 3. REFUSED 4. INFOR AT DOOR 5. UNOCCUPIED 6. ESTIMATED 7. NOT AT HOME	—
INFORMATION CODE	
1. OWNER 3. AGENT 2. TENANT 4. OTHER	—
DATE INSPECTED	
MONTH	12
DAY	27
YEAR	88

NO./DATE	DESCRIPTION	DATE INSP.
12/27/88	ENLARGE UP. CHG.	

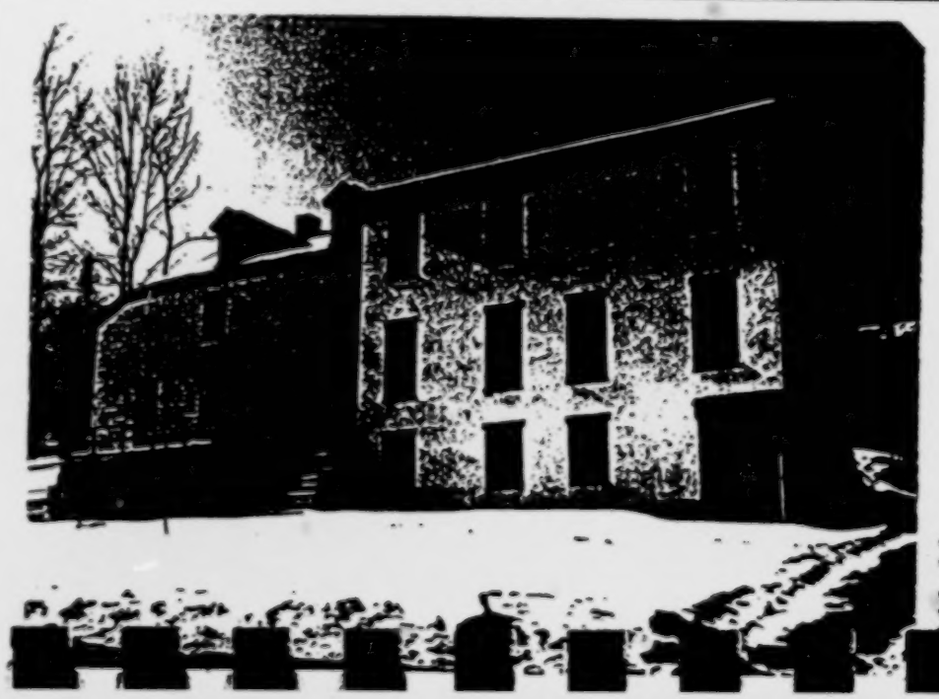


ADDITIONS, OUTBUILDINGS & IMPROVEMENTS

	TYPE	YEAR	AREA	GRADE	COND.	PERCENT GOOD Phys.	PERCENT GOOD Funct.
	02	1933	672	3.00	1	02 %	100 %
	12	1933	240	3.00	1	02 %	100 %
	03	1933	672	3.00	1	02 %	100 %
	04	1933	672	3.00	1	02 %	100 %
						%	%
						%	%
						%	%
						%	%

NOTES:

ADDITION – OUTBUILDING CODES
10 – 1s Frame 11 – OFP 12 – EFP 13 – Frame/Block Garage 14 – Shed 15 – Frame Bay Window 16 – Frame Overhang 17 – 1/2 Story Frame 18 – Attic (Unfinished) 19 – Attic (Finished)
If Masonry Add 10 To Above Code Number
If 2 Story Add 30 To Above Code Number
30 – Unfinished Basement 31 – Carport/Canopy 32 – Patio 33 – Terrace 34 – Pool 35 – Tennis Court 36 – Barn 37 – Greenhouse 38 – [illegible] 39 [illegible] 80 [illegible] Home 99 [illegible]



96-39

Supreme Court, U.S.
FILED
OCT 12 1999
OFFICE OF THE CLERK

No. 99-441

In The

Supreme Court of the United States

LEON KIRKPATRICK, et al.,

Petitioners,

v.

CITY OF BANGOR,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Judicial Court Of The State Of Maine

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Does 17 M.R.S.A. § 2851 violate the Due Process Clause by authorizing a municipality to order the demolition of a structure upon a finding, made during a public hearing, that the building constitutes a dangerous building and a nuisance where the property owner has been given notice of the hearing and has been afforded the opportunity to be heard?

II. Does 17 M.R.S.A. § 2851 violate the Due Process Clause by authorizing a municipality to order the demolition of a building that has been found to be dangerous and a nuisance as a matter of fact without first giving the owner an opportunity to repair where the owner has not presented any specific rehabilitation plan or expressed any intention to completely rehabilitate the building in the near future?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, the City of Bangor, respectfully requests that the Court deny the Petition for Writ of Certiorari seeking review of the decision and judgment of the Maine Supreme Judicial Court, sitting as the Law Court ("Law Court"), issued on May 13, 1999, reproduced in the Appendix to the Petition for Writ of Certiorari ("Pet. App.") at 1a-12a, reported in *Kirkpatrick v. City of Bangor*, 1999 ME 73, 728 A.2d 1268 (Me. 1999).

STATEMENT OF THE CASE

A building has existed on the corner of Highland Avenue and Charles Street in the City of Bangor, Maine since 1880. Petitioners, Leon and Gertrude Kirkpatrick, purchased this building, known as 30 Highland Avenue, in the mid-1950s. The building was occupied until 1983, when it was placarded as unsafe for human habitation, and has remained vacant ever since. Pet. App. at 2a.

From 1988 until 1996, the Bangor Code Enforcement Office received thirty-nine complaints about the property, many of which concerned the building being unsecured, others which concerned children and vagrants being found in the building. Pet. App. at 3a, 34a, 71a-73a. Additionally, items of value left in the building, including electrical fixtures and copper wiring, have been stolen from the building. Pet. App. at 34a, 40a.

In March 1996, the City of Bangor, through its Code Enforcement Office, contacted the Kirkpatricks to request

an inspection of 30 Highland Avenue. The Code Enforcement Office informed the Kirkpatricks that the purpose of this inspection was to determine whether the property should be considered for condemnation by the Council as a dangerous building. Pet. App. at 2a, 29a.

The City's Building/Housing Inspector inspected both the interior and exterior of the structure with Mr. Kirkpatrick in early May 1996. On August 29, 1996, the Kirkpatricks were notified that the City Council would hold a hearing on September 25, 1996, to determine whether the building should be condemned in accordance with 17 M.R.S.A. § 2851. The hearing was postponed until October 28, 1996. The Kirkpatricks attended the October 28 hearing, represented by counsel. Pet. App. at 2a.

At the hearing, the City's Code Enforcement Officer summarized the Code Enforcement Office's history with the property. He testified that the building had been placarded as unsafe for human habitation in 1983 and remained vacant through the date of the hearing. He testified that there was no heat in the structure because the heating plants had frozen and burst, there was no electricity service, and he described the general condition of the structure as deteriorated. The Code Enforcement Officer also explained that the property had lost its nonconforming use status for five dwelling units and could only be reused as a one- or two-unit residence. Pet. App. at 28a-30a.

The City's Building/Housing Inspector testified about the condition of the property on the basis of his inspection in May 1996, conducted with Mr. Kirkpatrick.

The Inspector stated that he found foundation problems, structural problems, rotted decks, broken and missing windows, two chimneys in need of repair, rotted fascia and soffit trim, and rotted window trim and wood siding on the exterior of the building. He also noted that there were missing and rotted steps, and broken glass and other debris in the yard. On the interior of the building, he described an unsafe staircase, and stated that the interior required new electrical work, new bathroom fixtures, and new surfaces. Pet. App. at 31a-32a.

The City Engineer testified concerning the structural integrity of the structure. He stated that there appeared to be significant structural cracks in the masonry wall, with some signs of repair, and there were signs of recent movement of a corner post and possibly the steel supports. He also observed distortion of the roof planes and movement in the rear portion of the building. He did not, however, conduct an interior inspection. Pet. App. at 67a-68a.

In addition to the testimony, the record was supplemented with a packet compiled by the Code Enforcement Officer containing various documents from the Code Enforcement Office's property file for 30 Highland Avenue, all of which were public record, including the thirty-nine complaints concerning the property from 1988 to 1996. Pet. App. at 28a.

Several citizens spoke at the hearing of their own accord, one against and two in favor of the condemnation. The City Solicitor cautioned the Council, however, that the desires of the public were irrelevant to the issue of whether the structure constituted a nuisance and their

considerations must be based solely on the criteria set forth in the statute. Pet. App. at 57a-66a.

The Kirkpatricks' counsel argued that the building was not dangerous or a nuisance and submitted documents for inclusion in the record. He challenged the findings of the Code Enforcement Officer, Housing/ Building Inspector, and City Engineer, without presenting witnesses, expert or otherwise. Pet. App. at 50a. He admitted that the structure had been the subject of repeated vandalism and had various items stolen from it, such as its copper and electrical fixtures. Pet. App. at 34a, 40a.

While the Kirkpatricks expressed a vague intent to rehabilitate the property, they did not present any specific plans or time-lines for rehabilitation. In fact, their counsel stated that he did not know when the Kirkpatricks would be able to completely rehabilitate the building. Pet. App. at 50a. The Kirkpatricks chose not to personally testify at the hearing.

The City Council voted to condemn the structure as a dangerous building and nuisance pursuant to 17 M.R.S.A. § 2851. Pet. App. at 68a-70a, 19a-21a. The Council decided that the appropriate way to dispose of the structure and abate the nuisance was to order its demolition within thirty days, as the Kirkpatricks failed to present any reasonable plan for rehabilitation or other alternative. Pet. App. at 10a.

The Kirkpatricks appealed the Council's decision to the Penobscot Superior Court, alleging that 1) there was insufficient evidence in the record to support the City

Council's finding; 2) the City Council relied upon aesthetic and non-public safety concerns in condemning the property; and 3) the property owner is entitled to a specific list of the conditions which render a structure a nuisance and reasonable opportunity to repair as a matter of constitutional law. Pet. App. at 14a.

The Superior Court granted an evidentiary hearing limited to the issue of taking without just compensation. The Superior Court held that there was sufficient evidence on the record for the City Council to find that the building constituted a dangerous building and a nuisance and that the City Council did not rely on improper considerations. The court also held that the City Council was constitutionally required, when prescribing what disposal must be made of a structure adjudged to be dangerous and a nuisance under 17 M.R.S.A. § 2851, to advise property owners of the specific defects which render a structure dangerous and a nuisance and give them a reasonable time to repair the defects prior to ordering the demolition of the structure. Pet. App. at 13a-18a.

The City of Bangor appealed to the Supreme Judicial Court of Maine the portion of the Superior Court's Order on Appeal which prohibited the City from ordering demolition without first providing the Kirkpatricks with a specific list of defects which render the structure dangerous and a nuisance and giving them an opportunity to repair those defects.

The Supreme Judicial Court held the Superior Court erred by requiring the City to act beyond the scope of the statute. *Kirkpatrick v. City of Bangor*, 728 A.2d 1270 (Me. 1999), Pet. App. at 1a-12a. The court stated that a City has

a substantial interest in eliminating a building that is dangerous and a nuisance is justified in ordering demolition when a property owner has "received multiple notices of problems with the building, and [the property owner] present[s] no plan and expresses no intention to repair the building at the hearing convened for the very purpose of determining whether the building should be condemned." *Id.* at 1273, Pet. App. at 11a. Essentially, the court held that there was no violation of due process under the Maine Constitution or the Fifth and Fourteenth Amendments of the United States Constitution because the property owners had been given two month's notice of the hearing and, after making the determination that the building constituted a dangerous building and a nuisance, provided them with "an appropriate forum to present a plan for rehabilitation or other alternatives to demolition." *Id.* at 1272, Pet. App. at 9a-10a.

REASONS FOR DENIAL OF THE WRIT

The Maine Supreme Judicial Court's decision in *Kirkpatrick v. City of Bangor* that there was no due process violation when the Bangor City Council ordered the demolition of a building that was found to be dangerous and a nuisance as a matter of fact after giving the property owner notice and opportunity to be heard does not conflict with the rulings of other states and federal circuit courts. Likewise, the decision does not represent a departure from the existing due process doctrine in light of the facts and circumstances of this case. The outcome of *Kirkpatrick* was determined by the facts of the case rather than a misapplicaton of due process.

I. CERTIORARI SHOULD BE DENIED BECAUSE THERE IS NO CONFLICT BETWEEN THE RULING OF THE MAINE SUPREME JUDICIAL COURT IN THIS CASE AND THE RULINGS OF OTHER STATE HIGH COURTS AND FEDERAL CIRCUIT COURTS REGARDING WHAT NOTICE AND OPPORTUNITY TO BE HEARD IS REQUIRED BY DUE PROCESS BEFORE A MUNICIPALITY, ACTING UNDER STATE LAW, MAY ORDER THE DEMOLITION OF A BUILDING THAT IS DANGEROUS AND A NUISANCE IN FACT.

The Maine Supreme Judicial Court's decision in *Kirkpatrick* does not conflict with the rulings of other states and federal circuit courts when it upheld the Bangor City Council's order to demolish a building that was determined to be dangerous and a nuisance in fact after giving the property owner notice and opportunity to be heard at the hearing.

Neither of the two cases on which the Petitioner relies held that due process under the Fifth and Fourteenth Amendments requires a municipality to provide a specific list of defects and afford time to repair prior to ordering demolition.

In *Hancock v. City Council of Davenport*, 392 N.W.2d 472 (Iowa 1986), the court held that the City's demolition order was invalid because it failed to comply with the notice provisions contained in its own ordinances. The court held that since the ordinances required the City to notify a property owner of the findings of the building inspectors that might lead to demolition, and such information was not provided, the notice was invalid. *Id.* at 477.

The court did not, however, hold that due process required such information to be contained in the notice; rather, the City's failure to comply with its own notice procedures violated due process. In fact, the court in *Hancock* specifically noted that razing a nuisance building is within a City's authority, although action short of demolition may be appropriate if it can effectively abate the nuisance. *Id.* at 475.

In *Miles v. District of Columbia*, 510 F.2d 188 (D.C. Cir. 1975), the District of Columbia Board for the Condemnation of Insanitary Buildings condemned a building as insanitary in November 1963 and ordered its demolition by March 1964. The property owner then began restoring the property, with the Board's permission. Six years later, after the property owner had invested substantial money in the property, the condemnation notice had been removed from the building, and the property owner had been told that the building was "beyond demolition," the Board decided in an *ex parte* meeting to demolish the building. When the Board was unable to personally notify the property owner, it decided to provide notice through publication. *Id.* at 190-91. The court determined that the property owner was entitled to notice and an opportunity to be heard before the building was demolished and that the attempted notice through publication was not reasonably calculated to give actual notice. *Id.* at 193.

As in *Hancock*, the *Miles* court specifically recognized that "a municipality in the exercise of its police power may, without compensation, destroy a building or structure that is a menace to the public safety or health." *Id.* at 192. The court also stated that a municipality must give

sufficient notice, opportunity to be heard, and opportunity to demolish the building or make it safe before the municipality steps in to demolish it. *Id.*

There are several reasons why the City of Bangor's actions, taken pursuant to 17 M.R.S.A. § 2851, complied with due process. First, the defect in both *Hancock* and *Miles* was the municipalities' failure to give adequate notice before the municipalities took action. In *Hancock*, the municipality failed to follow its own notification procedures and in *Miles*, inadequate notice was provided before demolition was commenced. In *Kirkpatrick*, however, there was no such defect in notification. The City complied with all statutory notification procedures and the Kirkpatricks were personally notified of the hearing two months before the hearing took place. Moreover, the Kirkpatricks, through counsel, participated in the hearing.

Second, the standards under which the Council evaluated the building were clearly set forth in 17 M.R.S.A. § 2851. The notices sent to the Kirkpatricks specifically cited the statute. Therefore, the Kirkpatricks knew, or reasonably could have discovered, the standards the Council would use to evaluate whether the building should be condemned. Additionally, the Kirkpatricks were aware of the building's problems: the Kirkpatricks received the thirty-nine violation notices from the Code Enforcement Office; Mr. Kirkpatrick accompanied the City Inspector in May 1996 when he inspected the building; and the Kirkpatricks attended the hearing before the City Council and learned of the Council's additional concerns. The Kirkpatricks had the opportunity at the hearing to directly address those concerns.

Third, the City made a factual determination on the basis of the evidence presented at the hearing, that the only effective way to abate the nuisance was to demolish the building. The lack of a definite rehabilitation plan, fire hazards, structural problems, and the recurrent break-ins, led the Council, and subsequently the Maine Supreme Judicial Court, to the conclusion that the Kirkpatricks had no intention of making the property safe and the only effective way to abate the nuisance was demolition. The Kirkpatricks were then given a reasonable time, thirty days, to demolish the building without City intervention.

The mere fact that the Kirkpatricks disagreed with the Council's findings does not lead to the conclusion that the Kirkpatricks' due process rights were denied. It is a property owner's duty, not a municipality's, to formulate a rehabilitation plan to address a City Council's concerns. Furthermore, it is not a violation of due process for a municipality to bring a condemnation action against a property under 17 M.R.S.A. § 2851, and evaluate a building under the standards contained therein, while not issuing citations for those conditions under its municipal ordinances. Conditions that may render a building dangerous and a nuisance under the statute may not constitute code violations or may be legally non-conforming.

Since the Kirkpatricks were given proper notice and the opportunity to be heard and the Council determined that the only way to abate the nuisance was to demolish the building, *Kirkpatrick* is in harmony with *Hancock* and *Miles*.

Moreover, none of the secondary authorities the Petitioners cite conflicts with the Maine Supreme Court's holding in *Kirkpatrick v. City of Bangor*. McQuillin on Municipal Corporations explicitly recognizes that municipalities have the authority under their police powers to order the demolition of dangerous buildings without compensation, subject to public necessity. 7A McQuillin Mun. Corp. § 24.561 (3rd Ed. 1989 & Supp. 1999). Where the only way to abate the dangerous condition is to demolish the structure, an order of demolition would be appropriate.

Similarly, even the 1965 Harvard Law Review Note cited by the Petitioners recognized that municipalities have the authority to order the demolition of dangerous buildings, provided there are no alternative remedies, and the property owner is given notice and opportunity to be heard. Note, *Enforcement of Housing Codes*, 78 Harv. L. Rev. 801, 832 (1965).

Certiorari should therefore be denied because there is no conflict in the interpretation of the law or change in the prevailing view of due process.

II. CERTIORARI SHOULD BE DENIED BECAUSE THE DECISION OF THE MAINE SUPREME JUDICIAL COURT DOES NOT REPRESENT A DEPARTURE FROM THE EXISTING DUE PROCESS DOCTRINE.

The Maine Supreme Judicial Court's decision in *Kirkpatrick v. City of Bangor* does not represent a departure from the existing due process doctrine. The Maine Supreme Judicial Court ruled that 17 M.R.S.A. § 2851

provides the necessary due process protections and that the City of Bangor complied with those procedures and applied the statute so as to afford due process to the Kirkpatricks when it ordered the demolition of the building at 30 Highland Avenue.

This Court has set the test for determining whether there is a deprivation of procedural due process, stating,

> the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

The Maine Supreme Judicial Court used this very framework in analyzing *Kirkpatrick* and determined, on the basis of the facts and circumstances of the case, that the City complied with the requirements of procedural due process. *See Kirkpatrick*, 728 A.2d at 1272-73, Pet. App. at 8a-11a.

First, the court considered the private interest involved, a property right, in the form of a building assessed for taxes in 1997 at $25,600. *Id.* Second, the court considered the risk of erroneous deprivation through the procedures used and the value of additional safeguards.

It concluded that the procedural requirements of the statute were followed, resulting in actual notice and participation in the hearing, it was reasonable for the City to order demolition without further procedural requirements based on the facts that the building remained vacant for fifteen years, the Kirkpatricks still did not have a rehabilitation plan, and the building was dangerous and a nuisance. *Id.* Finally, the court considered the City's substantial interest in abating nuisances and removing dangerous buildings. *Id.*

On the basis of the facts of the case and the *Mathews* balancing test, the court concluded that the City Council complied with due process when it condemned the building pursuant to 17 M.R.S.A. § 2851 and ordered its demolition.

None of the cases the Petitioners cite for the proposition that due process under the Fifth and Fourteenth Amendments requires municipalities to cite specific defects that must be repaired in order to abate the dangerous and nuisance character of a building and give the property owner additional time to repair those defects actually have such a holding. In fact, upon inspection, none of the cases conflict with the Maine Supreme Judicial Court's holding in *Kirkpatrick*.

The Petitioners cite *Blanchard v. City of Ralston*, 559 N.W.2d 735 (Neb. 1997), and *Hawthorne Savings & Loan Ass'n v. City of Signal Hill*, 23 Cal.Rptr.2d 272 (Cal.App. 2 Dist. 1993), for the proposition that meaningful notification requires notification of specific defects and the opportunity to repair; however, neither case stands for such a proposition.

In *Blanchard*, a municipality demolished a building under the emergency provision of their municipal code, rather than through a condemnation proceeding. The code explicitly gave property owners the right to repair dangerous buildings within a reasonable time after notice of the danger. The municipality, however, violated a property owner's due process rights by demolishing a building without providing the notice and opportunity to repair, as required by their own ordinance. *Blanchard*, 559 N.W.2d at 739.

The court held that the municipality's actions were unconstitutional because it failed to afford the property owner rights created by the municipal code, not because due process requires notification of what defects render a building dangerous and a nuisance and time to correct those defects.

Next, in *Hawthorne*, a court of appeals held that a municipality violated a California statute, and due process generally, by failing to comply with state law when it ordered demolition of a dangerous building within 120 days. The California statute provided that property owners "shall have the choice of repairing or demolishing a dangerous building," subject to certain limits, before a City may order demolition. *Hawthorne*, 23 Cal.Rptr.2d at 278.

The *Hawthorne* court, like the *Blanchard* court, invalidated the City's demolition order because the City failed to follow the written procedures, this time set forth in state law. While the court generally discussed due process, it never referred to the Due Process Clause of the United States Constitution.

Unlike the property owners in *Blanchard* and *Hawthorne*, the Kirkpatricks received notice of the hearing in a timely manner, two months prior to the hearing, and exercised their opportunity to be heard. Unlike the municipalities in *Blanchard* and *Hawthorne*, the City of Bangor complied with all statutory notice requirements of 17 M.R.S.A. § 2851 and therefore did not violate due process by failing to adhere to written procedures.

The Petitioners then cite *Johnson v. City of Paducah*, 512 S.W.2d 514 (Ky. App. 1974), and *Horton v. Gulledge*, 277 N.C. 353, 177 S.E.2d 885 (1970), *overruled on other grounds, State v. Jones*, 305 N.C. 520, 290 S.E.2d 675 (1982), for the proposition that a property owner should be afforded a reasonable time to repair a building to comply with a building code, if he desires. These decisions, however, were made on the basis of state constitutions and ordinances that provided for automatic demolition based on projected cost of repair. Neither court considered due process under the United States Constitution or a statute which permits a quasi-judicial body to tailor a remedy.

In *Johnson*, a property owner challenged a provision of a housing code that permitted the municipality to give a property owner the option of repairing a building where the cost of repair was 50 percent or less of the property's present value but required demolition if the cost exceeded 50 percent. Although the court recognized that a municipality has the power to order a dangerous building to be demolished under its police power, the mandatory order of demolition when the cost of demolition exceeds 50 percent of its value was held unconstitutional under the Constitution of Kentucky. Under the circumstances, the Kentucky Constitution required the

municipality to give the property owner time to repair the building to comply with the building code. *Johnson*, 512 S.W.2d at 516.

Similarly, in *Horton*, the Supreme Court of North Carolina held that the Law of the Land Clause of the North Carolina Constitution, not the Due Process Clause of the United States Constitution, prohibited a municipality from ordering the demolition of a building under its building code without providing the owner the opportunity to repair. *Horton*, 177 S.E.2d at 889-90. The municipal code in *Horton* also required the demolition of an unsafe building where the cost of bringing the building into compliance with the building code would exceed a certain percent, in this case 60 percent, of the value of the building in its present condition. *Id.* at 887.

In contrast to the codes in *Johnson* and *Horton*, 17 M.R.S.A. § 2851 does not require automatic demolition based on the projected cost of rehabilitation; rather, it permits municipalities to hold a quasi-adjudicative hearing to first determine whether a building is dangerous and a nuisance, and second determine how to effectively abate the nuisance, including the possibility of repair, if the circumstances warrant, or demolition. Neither the *Johnson* nor *Horton* courts considered whether a municipality could order demolition where a building was found to constitute a dangerous building and a nuisance as a matter of fact and where the municipality determines that the only effective method of abatement was demolition under the Due Process Clause of the United States Constitution.

The Petitioners next cite *Freeman v. City of Dallas*, No. 97-10907, 1999 WL 631750 (5th Cir. Aug. 18, 1999), for the proposition that prior notice of specific code violations is necessary in order to comply with due process. Rather, the case stands for the proposition that notification to permit a meaningful opportunity to be heard does not require specific notification of every defect.

The plaintiffs in *Freeman* argued that they were denied a meaningful opportunity to be heard in a condemnation proceeding resulting an order to demolish two buildings because they were not told that the Department of Housing and Neighborhood Services had briefed the government agency panel on the condition of the property, they were not provided with the Department's information on the properties, they were not given notice of tours the panel took of the property, and the Department officials who reported the code violations were not present at the hearings.

Nevertheless, the court held that the plaintiffs had sufficient notification to permit a meaningful opportunity to be heard because panel members conveyed their concerns to the plaintiffs during a site visit and at a rehearing. The court noted that the plaintiff also had the opportunity to call the Department officials who had cited the buildings for code violations and call any other people as witnesses, but did not do so.

Likewise, the Kirkpatricks had sufficient notification to permit a meaningful opportunity to be heard in *Kirkpatrick*. The Kirkpatricks were aware that the property had been burglarized and left unsecured on numerous occasions over the years because the Code

Enforcement Office repeatedly contacted them and required the building be resecured. Additionally, Mr. Kirkpatrick attended the building inspection with the City Inspector five months prior to the hearing. While the inspection did not result in the issuance of any violation notices under the Code of the City of Bangor, the Kirkpatricks had ample opportunity to contact the Code Enforcement Office to discuss the inspector's findings. Moreover, the Kirkpatricks had the opportunity to discuss and address the concerns of the City Council during the actual hearing.

Finally, neither the holdings in *Samuels v. Meriwether*, 94 F.3d 1163 (8th Cir. 1996), nor *Murray v. City of Wilkes-Barre*, 394 A.2d 1055 (1978) conflict with the holding in *Kirkpatrick*. While the courts in *Samuels* and *Murray* both upheld an order of demolition following an order to abate code violations, neither court addressed the issue of whether an opportunity to repair was constitutionally required.

Since the Maine Supreme Judicial Court's holding in *Kirkpatrick v. City of Bangor* does not conflict with the holdings of other courts and does not represent a departure from the due process doctrine, certiorari should be denied.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Dated: October 8, 1999

Respectfully submitted,

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In The

Supreme Court of the United States

LEON KIRKPATRICK, et al.,

Petitioners,

v.

CITY OF BANGOR,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Judicial Court Of The State Of Maine

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Respondent attempts to distinguish the cases cited in Petitioner's brief, but those cases are only a portion of the long line of judicial decisions which have recognized due process limitations on governmental power to destroy private property. Collectively, they represent the "time tested" parameters of due process, noted by this Court in *Goldblatt v. Town of Hempstead*, 396 U.S. 590, 82 S.Ct. 987, 8 L.Ed. 2d 130 (1962).

For over seventy-five years, Texas cases have recognized that a nuisance cannot be demolished if it can be abated by any other means. *Crossman v. Galveston*, 112 Tex. 303, 247 S.W. 810, 26 ALR 1210 (1923); *Houston v. Lourie*, 148 Tex. 39, 224 S.W. 2d 871, 14 ALR 2d 61 (1949).

The Appellate Division of the New York Supreme Court long ago recognized the proposition sought to be established here, that abatement of a nuisance through means other than destruction of the property was preferred. *Health Dept., City of New York v. Dasson*, 21 App. Div. 348, 47 N.Y.S. 641 (1897).

In *Abraham v. City of Warren*, 67 Ohio App. 492, 37 N.E. 2d 390 (1941), the Court recognized the potentially arbitrary nature of the police power to destroy property declared to be a nuisance. It was for that reason that an owner was entitled to a reasonable time and opportunity to repair before destruction could be ordered.

In *Horne v. City of Cordele*, 140 Ga. App. 127, 230 S.E. 2d 333 (1970), the Georgia Court of Appeals expressed the prevailing view as follows:

> [W]hile the right exists in the exercise of the police power to destroy property which is a menace to public safety and health, public necessity is the limit of that right and the property cannot be destroyed if the conditions which make it a menace can be abated in any other recognized way. [citations omitted]

Cases from numerous other states support this view. *Albert v. Mountain Home*, 81 Id. 74, 337 P.2d 377 (1959); *Aurora v. Meyer*, 38 Ill. 2d 131, 230 N.E. 2d 200 (1967); *Perepletchikoff v. City of Los Angeles*, 174 Cal. App. 2d 697, 345 P.2d 261 (1959); cf. *Shaffer v. City of Atlanta*, 223 Ga. 249, 154 S.E. 2d 241 (1967).

Thus, even if respondent is able to distinguish a particular case in its facts, the well-established principle which emerges is that public necessity is the limit of the right of destruction.

Stated another way, in terms of the three-prong test set forth in *Matthews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed. 2d 18 (1970), a municipality has a legitimate interest in abating nuisances; however, that interest does not extend to a right to destroy private property when the governmental interest can be vindicated by less draconian means.

Over one hundred years ago, in discussing the due process clause, this Court noted that governmental action which involved an "unnecessary invasion" into private property rights was invalid under the 14th Amendment. *Lawton v. Steele*, 152 U.S. 133, 138, 14 S.Ct. 499, 38 L.Ed. 2d 385 (1894). Petitioners' position tracks that concept: destruction of property when there are other, less drastic means, constitutes an "unnecessary invasion" of their

property rights. The Respondent's interest is in abating the nuisance; it has no legitimate interest in destroying the property. The Maine Supreme Judicial Court's decision advances well beyond any concept of public necessity, which has long been recognized as the outer limit of governmental police power. The Court should grant the petition to affirm that limit.

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